SUPREME COURT, U. S.

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878

SUSAN EPPERSON and H. H. BLANCHARD, Appellants,

v.

STATE OF ARKANSAS, Appellee.

APPEAL FROM THE SUPREME COURT OF ARKANSAS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 749

SUSAN EPPERSON and H. H. BLANCHARD, Appellants,

v.

STATE OF ARKANSAS, Appellee.

APPEAL FROM THE SUPREME COURT OF ARKANSAS

APPEAL DOCKETED OCTOBER 20, 1967
PROBABLE JURISDICTION NOTED MARCH 4, 1968

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APPENDIX.

In the
SUPREME COURT OF THE UNITED STATES.

October Term, 1967.

CHRONOLOGICAL LIST OF THE IMPORTANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD AND ORDERS ENTERED.

1. December 6, 1965 (Epperson complaint filed in Chancery Court of Pulaski County, Arkansas).

2. December 16, 1965 (Answer of Attorney General, State of Arkansas).

3. January 12, 1966 (Order of Pulaski Chancery Court permitting Intervention of Blanchard).

4. January 12, 1966 (Intervention of H. H. Blanchard, Jr.).

5. March 7, 1966 (Separate Answer of Little Rock School District).

6. March 13, 1966 (Response of Susan Epperson to Amendment to Answer by Attorney General).

7. March 16, 1966 (Amendment to Answer of State of Arkansas).

8. March 18, 1966 (Separate Answer of Attorney General to Blanchard Intervention).

9. March 18, 1966 (Epperson Motion to Confine Testimony and Limit Issues).

10. March 21, 1966 (Motion by Attorney General to Make More Definite and Certain).

11. March 22, 1966 (Response of Epperson to Motion to Make More Definite and Certain).

12. April 2, 1966 (Trial of cause by Pulaski Chancery Court).

13. May 27, 1966 (Memorandum Opinion of Pulaski Chancery Court).

14. June 16, 1966 (Decree of Pulaski Chancery Court).

15. June 21, 1966 (Notice of Appeal to Supreme Court of Arkansas).

16. June 5, 1967 (Per Curiam Opinion, Supreme Court of Arkansas).

17. June 5, 1967 (Concurrence of Associate Justice Paul Ward).

18. June 5, 1967 (Judgment of Reversal of Arkansas Supreme Court).

19. June 18, 1967 (Petition and Brief of Appellees for Rehearing before Arkansas Supreme Court).

20. July 26, 1967 (Order of Supreme Court of Arkansas Denying Petition for Re-hearing).

21. September 25, 1967 (Notice of Appeal to the Supreme Court of the United States).

In the
SUPREME COURT OF ARKANSAS.

STATE OF ARKANSAS, Appellant,

v. No. 5-4127

SUSAN EPPERSON, ET AL., Appellee.

Appeal From the Chancery Court of Pulaski County, Arkansas, First Division.

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[2] In the
CHANCERY COURT OF PULASKI COUNTY.

SUSAN EPPERSON, Plaintiff,

vs. No. 131575

W. C. McDONALD, RUSSELL MATSON, WARREN BASS, JAMES M. COATES, DR. JOHN A. HARRELL and MRS. FRANK GORDON, as Directors of Little Rock School District, and FLOYD PARSONS, as Superintendent of Schools, Defendants.

COMPLAINT.

I.

Plaintiff is a citizen and resident of Little Rock, Pulaski County, Arkansas. Plaintiff is a teacher by profession having a M. S. degree and presently is teaching science at Little Rock Central High School in the Little Rock School District under a teaching contract entered into between the plaintiff and the Directors of the Little Rock School District and approved by the Superintendent of Schools of the Little Rock School District.

II.

Defendants W. C. McDonald, Russell Matson, Warren Bass, James E. Coates, Dr. John A. Harrell and Mrs. Frank Gordon are members of the Board of Directors of the Little Rock School [3] District. Defendant Floyd Parsons is Superintendent of Schools of the Little Rock District. Defendants are necessary parties to this action, not because of their individual beliefs or opinions, but because in the performance of their statutory duties they will, unless enjoined by this Honorable Court, abridge plaintiff's constitutional rights, guaranteed to her by the Constitution of the United States and the Constitution of the State of Arkansas.

III.

This is an action for a declaratory judgment authorized by and under the terms of the Arkansas Declaratory Judgment Act, same being Arkansas Statutes 34-2501 through 34-2512.

IV.

As a teacher of science in the public schools of Arkansas, plaintiff conceives it to be her professional duty and responsibility to discuss with her students and to explain to them various and sundry scientific theories and hypotheses so that the student may be educated and enlightened as to all matters pertaining to science. Included in said scientific theories and hypotheses is the concept of evolution known as Darwinism as set forth in the "Origin of the Species" written by Charles Robert Darwin in 1859. Said scientific theory or hypotheses, that man ascended from a lower form of animal life, is a scientific observation and not a religious doctrine. Plaintiff intends to acquaint her students with the facts respecting this theory because plaintiff believes [4] that scholarship cannot flourish in an atmosphere of academic

and intellectual restraint and that teachers and students must be free to inquire, to study, and to evaluate. Plaintiff does not intend to ask or require that said scientific theory or hypotheses be accepted or rejected by the students. Plaintiff believes however that there can be no acceptance or rejection of any theory or hypothesis in the darkness of ignorance.

V.

Arkansas Statutes 80-1627 and 80-1628 prohibit the teaching or discussion of "the theory or doctrine that mankind ascended or descended from a lower order of animals" in the public schools of the State of Arkansas and further provide that in the event said theory or doctrine is taught in the public schools of Arkansas said teacher teaching or discussing said theory or doctrine shall be subject to a fine of $500.00 and dismissal from his or her teaching position. Said Statutes read as follows:

> 80-1627—"Doctrine of ascent or descent of man from lower order of animals prohibited.—It shall be unlawful for any teacher or other instructor in any University, college, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and commission, or other authority exercising the power to select textbooks for [5] above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals."
>
> 80-1628—"Teaching doctrine or adopting textbook mentioning doctrine—Penalties—Positions to be va-

cated.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act by teaching the theory or doctrine mentioned Section 1 hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a mis-demeanor and upon conviction shall be fined not exceeding five hundred dollars ($500); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

Plaintiff intends to discuss and explain said theory or doctrine to her students notwithstanding the provisions of said statutes and seeks the protection of her constitutional right to do so by this Honorable Court.

VI.

Plaintiff asserts and alleges that Arkansas Statutes 80-1627 and 80-1628, the so called "Monkey Bill" is void and of no effect, being unconstitutional and void as conflicting with plaintiff's constitutional right of freedom of speech as guaranteed [6] by the First and Fourteenth Amendments to the Constitution of the United States and by Article II, Section 6 of the Constitution of the State of Arkansas which provides "the free communication of thoughts and opinions is one of the invaluable rights of man: and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right". Plaintiff prays the judgment of this Honorable Court declaring such statutes above set out to be unconstitutional and void.

VII.

Plaintiff states that the sponsors of said statutes seek to justify its adoption and enforcement on the grounds that the Darwinian theory is a religious theory contrary

to Christianity. Such assertion is contrary to the facts and erroneous, but as interpreted by said sponsors constitutes action by the State to enter the field of religion which is specifically prohibited by Amendments I and 14 of the Constitution of the United States and Article II, Section 24 of the Constitution of the State of Arkansas.

VIII.

Plaintiff states that unless this Honorable Court enters its judgment and decree holding Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void, plaintiff will be subject to fine and dismissal from her teaching position. Plaintiff states [7] that the defendants will have no alternative but to dismiss plaintiff from her teaching position in the event the provisions of said act are invoked against plaintiff, and prays that this Court enter its order enjoining and prohibiting the defendants from cancelling plaintiff's contract because of the provisions of said statute.

Wherefore, Premises Considered, Plaintiff prays that this Court enter its order;

1. Declaring said Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void,

2. Enjoining said defendants as Directors and Superintendent of the Little Rock School District from cancelling and dismissing Plaintiff's contract to teach school in the public schools of Little Rock because of the provisions of said unconstitutional statutes.

3. For all other relief to which plaintiff may be entitled.

WARREN & BULLION,
By /s/ EUGENE R. WARREN,
Attorneys for Plaintiff.

(Verification omitted.)

[9] Return of the Sheriff of Pulaski County, Arkansas shows service of summons December 7, 1965 on:

Mr. James M. Coates, in person.
Dr. John A. Harrell, in person.
Mr. Floyd Parsons, in person.
Mrs. Frank Gordon, in person.
Russell Matson, in person.
W. C. McDonald, in person.
Warren Bass, in person.

[10] **ANSWER.**

(Formal parts omitted.)

Comes Bruce Bennett, Attorney General, by Dick Adkisson, Chief Assistant Attorney General, and pursuant to Ark. Stat. Ann. S 34-2510 (Repl. 1962) denies each and every material allegation contained in plaintiff's complaint.

Wherefore, tthe Attorney General prays plaintiff's complaint be dismissed and she take nothing herein.

BRUCE BENNETT,
Attorney General,
/s/ DICK ADKISSON,
By: DICK ADKISSON,
Chief Assistant Attorney General.

[12] **DEMURRER.**

(Formal parts omitted.)

The Defendants demur to the Complaint of the Plaintiff for the reason that the Complaint fails to allege sufficient facts, and to state a cause of action, upon which the prayed for or any other proper relief can be granted.

Wherefore, the Defendants pray that the Complaint of the Plaintiff be dismissed; that Defendants recover their costs herein expended; and that Defendants have all other relief to which they may be entitled.

SMITH, WILLIAMS, FRIDAY & BOWEN,
11th Floor, Boyle Building,
Little Rock, Arkansas,
Attorneys for Defendants,
By /s/ HERSCHEL H. FRIDAY,
HERSCHEL H. FRIDAY.

[14] ORDER PERMITTING INTERVENTION.

(Formal parts omitted.)

Hubert H. Blanchard, Jr., is hereby permitted to intervene in the above styled action.

/s/ MURRAY O. REED,
Chancellor.

Dated: 1-12-66.

[15] INTERVENTION OF HUBERT H. BLANCHARD, JR.

(Formal parts omitted.)

Comes Hubert H. Blanchard, Jr., and respectfully praying permission of this Honorable Court files herewith his intervention in the above styled cause and states:

1. Intervenor is a citizen and resident of the State of Arkansas and is a citizen of the United States; he is the father of two sons, age 17 and 15, who are students in the public schools of the State of Arkansas, and for whose benefit intervenor enters this litigation as well as for the

assertion of his constitutional rights as a citizen and parent.

2. Intervenor adopts the allegations in the complaint of the plaintiff in the above styled action as fully and completely [16] as if set out in this intervention.

3. As a parent of students in the public schools of the State of Arkansas, intervenor desires that his children receive the highest quality and most complete education (and educational advantages) provided or which could be provided by the public school systems in the State of Arkansas. Intervenor asserts that to deny his sons the right to be informed of all scientific theories and hypotheses is to deny them access to a complete education so highly desirable for the development of mental capacity and ability; that the guaranties of the 14th Amendment of the Constitution of the United States secure to every citizen of the United States the right to access to all sources of knowledge and learning including the right to be informed of scientific theories or hypotheses irrespective of whether the scientific theories or hypotheses are accepted or believed by a majority or minority of the other citizens of the United States. The Intervenor asserts that the guaranty of freedom of speech provided by both the Constitution of the United States and the Constitution of the State of Arkansas includes the guaranty of the freedom to learn. A complete and satisfactory education requires that scholars be informed of what may not be believable as well as what may be believable and academic freedom to learn demands that the scholar and not a political majority, shall have the right to select what, to him, is believable and what is [17] not believable. The Constitutions of both the State of Arkansas and of the United States secures to every scholar the constitutional right to be informed of all scientific theories and hypotheses and the constitutional right, unrestricted by belief of the

majority, to accept that which he and he alone considers credible and worthy of belief.

Intervenor asserts and alleges that Arkansas Statutes 80-1627 and 80-1628 deny to intervenor's sons the right to be taught and to learn, and in doing so contravenes the guaranties of freedom of speech and freedom to learn secured by the Constitution of the United States and the Constitution of the State of Arkansas. Intervenor asserts that said Statutes are void and of no effect and that this Court should enter its decree declaring said Statutes unconstitutional and void.

Wherefore, premises Considered, Intervenor prays that this Court enter its order declaring Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void.

WARREN & BULLION,
1450 Tower Building,
Little Rock, Arkansas,
By: /s/ EUGENE R. WARREN,
Attorneys for Intervenor.

[19] **SEPARATE ANSWER TO COMPLAINT AND INTERVENTION.**

(Formal parts omitted.)

Come the defendants, W. C. McDonald, Russell Matson, Warren Bass, James M. Coates, Dr. John A. Harrell and Mrs. Frank Gordon, as Directors of Little Rock School District, and Floyd Parsons, as Superintendent of Schools, and for their separate answer to complaint of the plaintiff, Susan Epperson, and the intervention of the intervenor, Hubert H. Blanchard, Jr., state:

1.

Defendants admit the allegations contained in paragraph I of the complaint.

2.

Defendants admit the allegations contained in paragraph II of the complaint with the exception of the statement therein that by performance of their statutory duties as members of the Board [20] of Directors of the Little Rock School District and Superintendent of Schools of the Little Rock School District, respectively, they will, in complying with the laws of this state, abridge any of the plaintiff's constitutional rights as guaranteed to her by the Constitution of the United States or the State of Arkansas.

3.

Defendants admit the allegations contained in paragraph III of the complaint.

4.

Defendants are without sufficient information on which to formulate an answer to the allegations contained in paragraph IV of the complaint and, therefore, deny them.

5.

With reference to paragraph V, defendants admit that Ark. Stats. 80-1627 and 80-1628 are quoted correctly; do not know, and, therefore, deny plaintiff's stated intention to discuss and explain the theory or doctrine of evolution; and deny that plaintiff has a constitutional right to do so.

6.

Defendants deny the allegations contained in paragraph VI of the complaint.

7.

Defendants do not know the intent of the sponsors of Ark Stats. S80-1627 and S80-1628 and deny all allegations of paragraph [21] VII of the complaint.

8.

With reference to the allegations of paragraph VIII of the complaint, defendants will comply with the provisions of Ark. Stats. S80-1627 and S80-1628 as long as they are in force and effect, but, of course, will honor any order of this Court.

9.

With reference to the allegations of the intervention, defendants admit paragraph 1, reassert their answers to the allegations of the plaintiff's complaint adopted by intervenor, and deny the allegations contained in paragraph 3 of the intervention.

10.

All the allegations of the complaint and the intervention not admitted are denied.

Wherefore, defendants pray that the complaint and intervention be dismissed with prejudice, that defendants recover their costs herein expended, and that defendants have all other proper relief.

SMITH, WILLIAMS, FRIDAY & BOWEN,
1100 Boyle Building,
Little Rock, Arkansas,
Attorneys for Defendants.
By /s/ HERSCHEL H. FRIDAY,
HERSCHEL H. FRIDAY.

[23] **MOTION TO MAKE MORE DEFINITE AND CERTAIN.**

(Formal parts omitted.)

Comes now the State of Arkansas in regard to paragraph VII of the complaint in which there is an allegation that "the sponsors of said statutes seek to justify its adoption and enforcement . . . as interpreted by said sponsors constitutes action by the State to enter the field of religion . . ."

Defendant is unable to ascertain from the reading of paragraph VII of the complaint as to who the plaintiff means when she refers to "sponsors" in that the subject act was adopted in 1928.

Wherefore, Premises Considered, the State of Arkansas moves the plaintiff to state specifically by name and address who they refer to as "sponsors" in paragraph VII of the complaint.

By: /s/ BRUCE BENNETT,
BRUCE BENNETT,
Attorney General,
Attorney for Defendant.

[43] **RESPONSE TO FIRST AMENDMENT TO THE STATE OF ARKANSAS' ANSWER.**

(Formal parts omitted.)

Comes the plaintiff and in reply to the First Amendment to the State of Arkansas' Answer states and alleges:

1. The answer of the attorney general alleges that the plaintiff and the Little Rock School Board executed a contract for plaintiff to teach in the Little Rock School District. Plaintiff admits the execution of said contract but plaintiff denies that by executing said teaching con-

tract she elected to waive her right as a citizen of Arkansas to challenge the constitutionality and validity of the statutes of Arkansas. The Attorney General further alleges that initialed Act No. 1 of 1928 (Ark. St. 80-1627 and 80-1628) was in force in the State of Arkansas when plaintiff signed said teaching contract and became a part of said contract. The plaintiff admits that said [44] statute was in existence at the time she signed said contract but denies that said statute was a valid statute and denies that by signing said contract she waived any privileges, immunities, or guarantees of either the federal or state Constitution. Plaintiff asserts that a teacher in the public schools is entitled to all the privileges, immunities and guarantees of both the federal and state constitution.

2. The attorney general asserts in said answer that plaintiff seeks to breach said contract and put her employers in the unenviable position of law breakers. Plaintiff denies that she seeks to breach her contract and states that by asserting her constitutional privileges, immunities and guarantees she is not breaching a contract, and denies that she seeks to put her employers in the position of law breakers by asserting the invalidity of an act which if declared invalid could not possibly apply to either plaintiff or her employer.

3. Plaintiff denies that she seeks to substitute her judgment for that of her employer and denies that she seeks to explain a theory contrary to the policy of the Little Rock School District. Plaintiff asserts and alleges that the act herein asserted to be unconstitutional usurps the power of the Little Rock School District and the Little Rock School Directors to adopt policy with respect to the teaching of scientific theories.

4. The plaintiff admits the existence of Article 14 [45] Section 4 of the Constitution of the State of Arkansas which reads as follows:

"Supervision of schools.—The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

and asserts that Ark. St. 80-1627 and 80-1628 are unconstitutional and void as being in direct conflict with the provisions of Article 14, Section 4 of the Constitution of the State of Arkansas. The plaintiff asserts that the supervision of the public schools is constitutionally placed in the hands of school directors and administrators and that any act seeking to usurp the authority and power of the school administrators to select the proper curriculum to be taught is an invasion of the direct provisions of Article 14, Section 4 and is unconstitutional and void.

Wherefore, plaintiff prays as in her complaint.

WARREN & BULLION,
By /s/ EUGENE R. WARREN,
1450 Tower Building,
Attorneys for Plaintiff.

[29] **DEFENDANTS' FIRST AMENDMENT TO THE STATE OF ARKANSAS' ANSWER.**

(Formal parts omitted.)

Comes now Bruce Bennett, Attorney General of the State of Arkansas, and for his amended answer to the complaint states and alleges:

I.

The State of Arkansas admits that the plaintiff is a citizen and resident of Little Rock, Arkansas, is a teacher and presently teaching science at Little Rock Central High School in the Little Rock School District under a teaching contract entered into by the plaintiff and the Directors of the Little Rock School District and approved by the

superintendent, a copy of said contract being attached to this answer and made a part of this answer as if recited herein verbatim.

[30] II.

The State of Arkansas adopts the pleading contained in paragraph II of the separate answer of the Little Rock School Board.

III.

The State of Arkansas admits the allegations contained in paragraph III of the complaint.

IV.

In response to paragraph IV of the complaint, the State of Arkansas states and alleges that the plaintiff is bound by the provisions of the contract which she executed in the course of her employment as a teacher in the Little Rock School System.

In regard to her concept that it "is her professional duty and responsibility to discuss with her students and explain to them various and sundry scientific theories and hypotheses so that the student may be educated and enlightened as to all matters pertaining to science," the people of the State of Arkansas on October 6, 1928, adopted the provisions of Initiated Act No. 1 and made it unlawful for the plaintiff to teach the theory that man ascended or descended from a lower order of animals. This was adopted by a vote of 108,991 for with 63,406 against. This was the law of Arkansas when she executed her contract for employment and became a part of said contract [31] as if recited word for word therein.

So, in essence, the plaintiff seeks to breach her contract and put her employers in the unenviable position of law-breakers. She has hired out to the school district, on a

monthly wage, part of which is paid for by tax moneys derived from throughout the state; she is not under any compulsion not to teach, explain or proclaim the theory of evolution, other than while in the service of the Little Rock School Board during teaching hours.

Section 6 of Article 2 of the Constitution provides for "the free communication of thoughts and opinions . . . that all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right . . ."

Such foregoing provision of the Arkansas Constitution does not permit the abrogation of contractual rights and duties freely made and entered into. Let her proclaim her rights to explain or teach evolution from any forum she desires other than in her classroom.

By S 1 of Art. 2, the people have declared:

"Vox populi" . . . the people rule. To add to or subtract from the designated subjects prescribed by local school boards would create an intolerable situation whereby prescribed subject matter would of necessity be shunted aside in favor of some extraneous material that an employed teacher thinks should be substituted to the detriment of prescribed courses. The plaintiff [32] seeks to substitute her judgment for that of her employer . . . the Little Rock School Board and the avowed law as enacted by overwhelming majority of the people of Arkansas.

The State of Arkansas further states that the plaintiff entered into a contract with the Little Rock School District on the second day of July, 1965, wherein she agreed in paragraph III thereof that the contract "shall be construed in accordance with all applicable laws and regulations governing the employment, compensation and conduct of teachers," and that by her execution thereof, she solemnly contracted to abide by the Constitution of Arkan-

sas and the State statutes and specifically Initiated Act No. 1 of 1928.

Section 4 of Article 14 of the Constitution of the State of Arkansas provides:

> The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly.

Following the enactment of the foregoing Section IV by the people in 1874, the people in their infinite wisdom some 54 years later decreed that the teaching of the theory of evolution in the public schools would be contrary to the best interest of the students therein.

The plaintiff's right of freedom of speech is not impaired in any manner whatsoever. She can hire herself a hall and teach [33] evolution seven nights a week and will not be abrogating her contract; she can buy radio or television time, as an individual, and espouse evolution all she wants to; the only prohibition is that she will not do it during the hours prescribed, five days a week, when she is teaching science on the public payroll.

Freedom of speech is not a right without limitation as well illustrated by the enactment of the so called Hatch Act which prescribes that federal employees will not participate in partisan politics; so the guarantee of freedom of speech has limitations and certainly has valid limitations where contractual rights have been solemnly entered into in an employer-employee relationship such as the parties hereto have agreed upon. (See 10 Ark. L. Rev. 156, "Legal Liability for the Exercise of Free Speech" by Robert A. Leflar.)

V.

In response to paragraph V of the complaint, the State of Arkansas states that there is no Constitutional guar-

antee to the plaintiff which would permit her to ignore her contractual responsibility: that in the alternative should her prayer to teach the Darwin Theory be granted then there is no limitation on what any teacher would be permitted to substitute and teach for the prescribed curricular in the public schools of Arkansas. It should be emphasized that she wants to teach the Darwin Theory only when in fact there are dozens of other off-beat theories [34] that other teachers might want to explain to their students. Someone has to administer the schools and our statutory and constitutional laws has prescribed that they shall be administered by the duly elected school directors and such other individuals as they may designate as administrators. To grant the prayer of the plaintiff to teach Darwin, in direct controvention of statutory law and school policy would destroy the orderly administration of our public schools.

VI.

The State of Arkansas specifically denies the allegations contained in paragraph VI of the complaint in that the plaintiff has freedom of speech at all times and the constitutional right of freedom of speech is guaranteed to her as an individual in off hours but does not carry with it the absolute right to teach what she deems appropriate during those hours in which she is on the payroll of the public schools of Little Rock. Should it be otherwise, any employee of any employer, while at work could suddenly feel moved to talk or explain anything or any subject on his employer's time, without regard to fulfilling his or her specific duties as a paid employee. The plaintiff may freely write and publish their sentiments on all subjects but she does not have any constitutional right to explain or expose a theory, to a captive audience of young children, contrary to the policies of the Little Rock School District. No one denies her right to teach

or explain any subject she desires to before the take-up [35] bell in the morning or after the dismissal bell in the afternoon at the school where she is employed.

VII.

The State of Arkansas further states that the allegations contained in paragraph VII that the "sponsors of said statutes seek to justify its adoption and enforcement on the grounds that the Darwinian theory is a religious theory contrary to Christianity;" the State answers by saying that we do not know who the sponsors of Initiated Act No. 1 of 1928, some 38 years ago, were. Nor do we know who the present day "sponsors" are. The State does say that the theory of evolution is contrary to the teachings of the Bible, but whether or not the theory of evolution is a scientific theory, the product of the vivid imagination of Charles Darwin or some other scientist is merely a matter of speculation on the part of the plaintiff. Since the so called sponsors are unnamed, the State of Arkansas is herewith filing simultaneously a motion to make more certain as to who the "sponsors" are so that we may require of them as to its adoption and enforcement, the purpose thereof, and if any of the 108,991 people who voted for it in 1928 might know of its purpose in adoption. Initiated Act No. 1 was put on a ballot as a result of an initative petition in reflection of the overwhelming view of the people of the State of Arkansas. [36] No one has been clamoring since the adoption some 38 years ago to start teaching that man descended from apes, monkeys, sharks, porpoises, sea weed or other types of animals or vegetables without a soul, except the plaintiff herein. The State of Arkansas has not abridged Amendment 1 nor 14 to the Constitution of the United States in that religion is not even mentioned or implied in Initiated Act No. 1 of 1929, and the plaintiff herein certainly has the same equal protection of the State of

Arkansas that every other citizen residing herein has. She merely seeks to breach her contract.

VIII.

The State of Arkansas further states that Initiated Act No. 1 applies to the School Board of the Little Rock School District just as much as it applies to the plaintiff and they are under a legal mandate to abide by the provisions of Initiated Act No. 1, but they have not prohibited her in any way from teaching, explaining or espousing the theory of evolution without the school building where she is employed to teach.

Wherefore, Premises Considered, the State of Arkansas prays that this Court enter its order dismissing the complaint for want of equity, on the further grounds that this suit is an attempt to deviate from the terms of a legal contract by the plaintiff hereto and that if the plaintiff should want to continue to explain the theory of evolution then she should resort to the initiative and referendum provisions of the [37] constitution of Arkansas and secure petitions to put same on the ballot and let the people of Arkansas again judge what theories and subjects they want taught in their public schools.

By: /s/ BRUCE BENNETT,
BRUCE BENNETT,
Attorney General,
Attorney for Defendants.

[39] Little Rock School District

TEACHER'S CONTRACT.

1965-66.

State of Arkansas, Classification IV-1
County of Pulaski. School Central High

This contract and agreement between the Board of Directors of the Little Rock School District of Pulaski

County, Arkansas, and Miss Susan Smith, 1613 Battery, Little Rock, Arkansas, a legally qualified teacher.

Witnesseth:

The Board of Directors, by a majority vote of the Directors present at a legally held meeting on April 29, 1965, offers to employ her to teach in the Little Rock Public Schools for the period beginning August 30, 1965, and ending June 3, 1966.

The salary to be paid the employee for this period of employment is: $4,725.

Both parties hereto agree that this contract shall be construed in accordance with all applicable laws and regulations governing the employment, compensation and conduct of teachers.

The teacher shall file in the office of the Superintendent an official transcript of college training, an acceptable proof of date of birth, and shall register a valid teaching license of highest grade attainable with college credits.

All school employees shall present annually, to the superintendent's office, a certificate from a regularly licensed physician showing condition of physical and mental health, as required by the laws of Arkansas and by the rules and regulations of the State Board of Health.

All teachers who have been residents of Arkansas for one year must present a poll tax receipt before drawing their salaries.

If the schools are dismissed for any reason over which the Board of Directors has no control as determined by the Board in its sound discretion, the teacher agrees to make up without pay such part of the time as the Board of Directors deems necessary.

The teacher agrees that the Board of Directors, as the employing agency, is authorized to make such deductions from the salary specified herein as may be required by Law for Teacher Retirement and taxes to the Government of the United States.

The teacher states that she is not related to any member of the School Board within degrees prohibited by the Laws of the State of Arkansas, and further agrees to conform to all requirements, rules, and regulations of the Board of Directors.

Assignment or reassignment of any employee may be made at the discretion of the Superintendent of Schools.

Both parties hereto agree that this contract may be cancelled by mutual consent upon written notice by either party duly presented at least 30 days before the effective date of such cancellation.

This offer terminates if not accepted by returning two signed copies to the Little Rock School Administrative Office, West Markham & Izard Streets, Little Rock, Arkansas, within ten (10) days of the date shown in the next paragraph.

Signed this 2nd day of July 1965.

Board of Directors,
School District of Little Rock,
By R. H. MATSON, JR., President,
By J. A. HARREL, JR., Secretary.

SUSAN SMITH EPPERSON,
Teacher (MRS. (Illegible) O.)

[25] **SEPARATE ANSWER TO THE INTERVENTION OF HUBERT H. BLANCHARD, JR.**

(Formal parts omitted.)

Comes now the State of Arkansas, by Bruce Bennett, the Attorney General, and in response to the intervention of Hubert H. Blanchard, Jr., states and alleges:

I.

The State is without knowledge as to the allegations contained in paragraph I and specifically are unable to learn from the allegations as to where the two sons are attending school in the State of Arkansas, whether a science course is offered in said school and whether these two young men are engaged in a science course or not. However, the State of Arkansas alleges that the intervenor, Hubert H. Blanchard, Jr., has for a long period of [26] years been a teacher, principal, and superintendent in the public schools of the State of Arkansas, and there is no prohibition whatsoever under the laws of the State of Arkansas from the intervenor acquainting his two sons with the theory of evolution.

II.

The State of Arkansas further states that in regard to all of the allegations contained in paragraph III, it has long been recognized by the school authorities of the State, by the Arkansas General Assembly, the parents and the public that there must be some uniform school curriculum provided in elementary school classes and that the assertion by the intervenor that "scholars should be informed of what may not be believable as well as what may be believable and academic freedom to learn demands that the scholar, and not a political majority, shall have the right to select what, to him, is believable and what is not believable" is antithetically and diametrically

opposed to the organization and conduct of an orderly school curriculum. Under the foregoing theory the intervenor espouses the public schools of Arkansas should be taught the "Hams and Eggs Theory of California", the "Way to Have More is to Produce Less" theory, the "God is Dead" theory, and that Charles Darwin was grossly wrong in his theory and that men evolved from brown sea weed as espoused by one Lawrence S. Dillon, Assistant Professor of Biology of Texas A. and M. College.

Should the allegations contained in paragraph III of the [27] intervention be construed as inalienable rights, then the public schools of the State of Arkansas must of necessity open its doors to the haranguing of every soap box orator with a crack pot theory on the premise that "it is scientific knowledge" which the students would have explained. The plaintiff in this case wants to explain one theory; if she should be permitted to do this, what is to prohibit John Doe of Riverside, California, coming to the science department of Little Rock Public Schools and saying that he wanted to teach his theory that man was evolved from the eruption of a gigantic earthquake which occurred in the year 1,000,000,000,006 B. C.

Wherefore, Premises Considered, the State of Arkansas prays that the intervention be dismissed for want of equity.

/s/ BRUCE BENNETT,
BRUCE BENNETT,
Attorney General,
Attorney for Defendants.

[41] **MOTION.**

(Formal parts omitted.)

Comes the plaintiff and files herewith her pretrial Motion for the purpose of defining the issues to be presented in this cause. The plaintiff moves:

1. That this Honorable Court exclude the testimony of scientific and religious witnesses and that statements of such witnesses, if any, be confined to written statements filed with the Court in triplicate either before or within a reasonable time after April 1, 1966.

2. That the issues to be tried in this case be limited to:

a. Evidence of plaintiff's occupation as a school teacher and her qualifications therefor.

b. Proof of the teaching contract executed between [42] plaintiff and the Little Rock School District.

c. Evidence as to what plaintiff seeks to teach to her classes.

d. Proof of the enactment of and existence of Arkansas Statutes 80-1627 and 80-1628.

e. Evidence of intervenors occupation and parental relationship.

f. Evidence as to what intervenor seeks to have taught to his children.

g. The admissions in the defendants' answers.

h. Any excerpt from the Bible or any scientific book or manuscript which has been reduced to writing and filed in triplicate.

i. Any rule or regulation of the Little Rock School District.

WARREN & BULLION,
By /s/ EUGENE R. WARREN,
1450 Tower Building,
Attorneys for Plaintiff.

[46] **RESPONSE TO MOTION TO MAKE MORE DEFINITE AND CERTAIN.**

(Formal parts omitted.)

Comes the plaintiff, Susan Epperson, and in answer to the Motion of the Attorney General of The State of Arkansas to Make More Definite and Certain, states and alleges:

The plaintiff used the word "sponsor" in her complaint to describe those who allege and assert the validity of the statute in question and not to describe the originator of the statute.

Wherefore, having fully answered, plaintiff prays as in the original complaint.

SUSAN EPPERSON,
By: WARREN & PULLION,
1450 Tower Building,
Little Rock, Arkansas,
[47] By: /s/ EUGENE R. WARREN,
Attorneys for Plaintiff.

[48] **MOTION TO MAKE MORE DEFINITE AND CERTAIN.**

(Formal parts omitted.)

Comes now the State of Arkansas and moves the Court that plaintiff be required to make her complaint more definite and certain in the following respects, to-wit:

Paragraph IV of the Complaint states in part:

> As a teacher of science in the public schools of Arkansas, plaintiff conceives it to be her professional duty and responsibility to discuss with her students and to explain to them various and sundry scientific

theories and hypotheses so that the student may be educated and enlightened as to all matters pertaining to science. (Emphasis ours.)

Plaintiff asks that these various theories be named and their authors enumerated; the date, if known, be stated, when such theories were first propounded; and the gist of such theories be expressed.

[49] Respectfully submitted,

/s/ BRUCE BENNETT,
BRUCE BENNETT,
Attorney General.

[50] **RESPONSE TO MOTION OF THE STATE OF ARKANSAS.**

(Formal parts omitted.)

Comes the plaintiff, Susan Epperson, and in response to the Motion of the Attorney General of The State of Arkansas, states and alleges:

The plaintiff desires to teach and believes she has a constitutional right to teach the following statement of the history of man:

> Man and mammals. The organs and systems of the human body closely resemble those of other mammals. The structural similarity of man and the other primates is especially striking. Almost every anatomical detail is similar. You can observe this similarity in the skeleton and muscles, tooth structure, position and [51] structure of the eyes, form of the hands and feet, and even in the facial expressions. Similarities in the internal structures of man and the other primates are equally striking. They may be seen in the structure of the heart and blood vessels, lungs, digestive organs, excretory organs, glands, and nearly all other internal organs.

Even the chemical secretions of man and other mammals are similar, and the digestive enzymes are the same. The insulin used to save the lives of diabetics is extracted from beef or hog pancreas. The RH factor, so important in matching human blood types, was discovered originally in the blood of the Rhesus monkey.

Although man is structurally and biochemically similar to the other mammals, he has significant differences that have allowed him to become biologically superior. He is the only mammal with truly upright posture. This is possible because he has a shortened and flattened pelvis which holds the abdominal organs. The upright posture freed man's hands so that they could be used entirely for manipulation. At the same time the action of man's thumb opposes that of the fingers, so that his hand is ideally suited for grasping. Because of their many sensory receptors, the hands are highly sensitive [52] to touch and are grooved so that they can grip smooth objects.

Both of man's eyes see the same vision from slightly different angles, resulting in an improved sense of depth. The combination of intelligence, acute vision, and efficient hands is ideal for the use of tools, an ability peculiar to man. The characteristic that has probably made the most difference in man's development, however, is his capacity to use symbols in the form of the written and spoken word. This ability to communicate with others of the same species by symbols and to pass learning on from generation to generation has allowed man to undergo a rapid cultural evolution not possible in other species.

Theories about man's development. In 1871 the English biologist Charles Darwin published his famous book entitled The Descent of Man. Darwin proposed

that the same forces operating to bring about changes in plants and animals could also affect man and his development. Biologists classify man as a primate because of his many structural similarities to the monkey, gorilla, chimpanzee, orangutan, and gibbon. In his book, Darwin pointed out these similarities, and some people interpreted his comparisons as suggesting that [53] man evolved from monkeys. Actually this unfortunate misinterpretation was far from Darwin's intent. As you know, it is the less specialized primitive forms that are most able to move into new environments and evolve into new species. The orangutans and chimpanzees of today are highly specialized forms that have probably evolved from more primitive ancestors. Likewise, modern man has probably evolved from primitive, more generalized ancestors. If we were able to trace the years, we might find a generalized primate that was common ancestor to both modern man and the modern primates. It is most likely, however, that the two lines of descent separated at a very early date and gradually evolved into the forms of today.

At the time Darwin lived, no remains of early man had been found. Since then hundreds of bones have been unearthed. They have been dated and studied by anthropologists, who specialize in the history of man. This evidence still does not provide us with a complete picture of man's development, but the fossils serve as clues from which hypotheses can be formed. A fossil skull indicates the size of the brain, shape of the head, and age of the man at the time of death. The jaw structure indicates whether its owner had the capacity for speech. It would not mean, however, that a language was used.

A study of the environment of primitive man also helps to piece together man's development. What

did early men eat? [54] Wherever the anthropologist finds evidences of primitive man, he searches for fossil remains of animals that might have been used for food. Charred indicate that he had learned to use fire to cook meat. The type of food also indicates the climate and nature of the surroundings. The anthropologist is also interested in evidence of tools, since their use is unique to man. If similar tools are found over a wide area, some type of communication must have occurred. The material used and the complexity of the tools are indications of how highly developed the men were.

Putting together the pieces. In 1924 a perceptive worker in a South African quarry noticed a small fossilized skull that had been dislodged by blasting. When the fossil was given to a South African medical school, Professor Raymond Dart, an anatomist, recognized its resemblance to human skulls. Dr. Dart named the primate Australopithecus africanus, which means "southern ape from Africa". Since then other bones of this primate have been found.

Dr. and Mrs. L. S. B. Leakey have spent nearly 35 years excavating and studying fossils. Much of their effort has centered in an area of the Olduvai Gorge in Tanganyika. They first found many pebble tools thought to have been used for cutting instruments. In 1959 the Leakeys unearthed some teeth, which led to the excavation of an area believed to be a campsite of ancient [55] man. Since then, skull fragments have been pieced together. Bones from a foot, fingers, and a lower jaw with well preserved teeth have provided us with clues about the structure of the primate that was named Zinjanthropus. By using the potassium-argon method, scientists at the University of California have placed its age at 1,750,000 years.

The bones of Zinijanthropus and Australopithecus are similar and look like those of modern apes. The pointed fanglike teeth of modern apes are not found in these forms, however. Also, the shape of the pelvis and opening for the spinal cord in the skull indicate an upright posture. Anthropologists are not agreed as to whether these forms should be placed in the ape family or in the family that includes man. In mid-1964 Dr. Leakey published an account of the discovery of the remains of still another primitive manlike form in the Olduvai Gorge. He has named this form Homo havilis, and dating evidence indicates that it lived at the same time as Zinijanthropus. Homo habilis, however, is more manlike. He seems to have walked and run erect, to have had a well opposed thumb, and to have eaten both meat and plant foods, like modern man. Dr. Leakey now believes that Homo habilis was the ancestor of modern man, while Zinjanthropus and Australophithecus were evolutionary dead ends. Dr. Leakey's theory indicates that the genus Homo [56] was present on earth about 1,200,000 years earlier than anthropologists had previously thought.

Early forms of man. In 1891 a part of a skull, a piece of a jaw, and an upper leg bone were discovered in an excavation on the island of Java. These remains lay in a deposit of sand and gravel transported by an early glacier, so that the period could be roughly dated. Similar remains were found in the same general region in 1937. Java man, as he was first called, is believed to have walked erect, so that he is now called Pithecanthropus erectus. He is thought to have lived 500,000 years ago. He had a slanting forehead and heavy brow ridges. The skull of Java man indicates that his brain, while only about half the size of modern man's, was more than

one third larger than that of the present-day gorilla. Anthropologists believe that Java man learned to make use of crude stone weapons and of fire. Pithecanthropus remains have also been discovered in excavations of ancient caves near Peking. Many of the skulls of Peking man that were found are broken near the base, suggesting that he was a head hunter.

Neanderthal man. More is known about Neanderthal man, who lived in Europe, Asia Minor, Siberia, and Northern Africa. Scientists believe that Neanderthal man disappeared about 25,000 years ago, near the close of the glacial age. Information [57] about him has been acquired from careful study of almost 100 skeletons, many of them nearly complete. He was about five feet tall and walked in a stooped position. His bone structure indicates that he was powerfully built. His facial features were coarse. Like Pithecanthropus, his forehead sloped backward from heavy brow ridges. His mouth was large, and he had little chin.

Neanderthal man lived in caves from which he journeyed on hunting expeditions in search of the hairy mammoth, saber-toothed tiger, and wooly rhinoceros. His brain was as large or larger than that of modern man. Neanderthal man used stone tools and weapons, made use of fire, buried his dead, and lived in a family group.

Cro-Magnon man. Anthropologists place Cro-Magnon man in the same species as modern man, Homo sapiens. He lived in Europe, especially in France and Spain, about 50,000 years ago. He had a high forehead and a well-developed chin, and lacked the heavy brow ridges of most of the more primitive men. Several caves along the southern coast of France have yielded Cro-Magnon weapons of stone and bone

as well as skeletons. The walls of these caves bear beautiful drawings of animals of the region. These drawings have been valuable in dating the period. Anthropologists believe that Cro-Magnon man, living at the same time as Neanderthal man and being superior to him in intelligence, [58] may have exterminated him. There is also evidence that Neanderthal man mixed with Cro-Magnon man and in time lost his identity.

In conclusion: Intelligence combined with highly efficient hands and the ability to communicate separate man from the other mammals. It is believed by man anthropologists that, although man evolved along separate lines from the primates, the two forms may have had a common, generalized ancestor in the remote past.

An anthropologist is truly a detective. Although fossils are few and scattered, they provide valuable information regarding life in the past. By dating the fossils and comparing the structures of bones, the anthropologist is able to form hypotheses regarding primitive man, the food he ate, the tools he used, and the environment in which he lived. The comparison of manlike types does not mean, however, that one developed from another. There is no conclusive evidence to link the forms that have been found, dated, described, and compared. Modern man may have developed from forms that have not yet been located.

WARREN & BULLION,
By: /s/ EUGENE R. WARREN,
Attorneys for Plaintiff.

[76] **PROCEEDINGS.**

(Caption omitted.)

April 2, 1966.

SUSAN EPPERSON,

plaintiff herein, and a witness in her own behalf, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Warren:

Q. Will you please state your name?

A. Susan Epperson.

Q. Where do you live, Mrs. Epperson?

A. 1613 Battery Street, here in Little Rock.

Q. What is your age?

A. 24.

Q. 24?

A. Yes, sir.

Q. Are you married?

A. Yes.

Q. What does your husband do?

A. He is a First Lieutenant in the United States Air Force.

Q. What is your occupation?

A. I am a school teacher.

Q. Will you give us a brief history of your education?

[77] A. I attended grade school and high school in Clarksville, Arkansas. I went to College at the College of the Ozarks in Clarksville, Arkansas and received my Bachelor in Science Degree there in 1962. From there I went to the University of Illinois in Urbana, Illinois and completed my Master's Degree in Zoology in 1964.

Q. How long have you taught in the Little Rock Public School System?

A. Since the Fall of 1964.

Q. Do you have a contract with the Little Rock School System?

A. Yes, I do.

Mr. Warren: Your Honor, this contract was attached to the pleadings.

A. I have the contract here.

Q. Will you identify that document of one sheet which I have just handed you?

A. This is it.

Mr. Warren: May we mark this as Exhibit No. 1.

The Court: Let it be introduced.

[78] (Thereupon, said contract was marked for identification as Exhibit No. 1 and received in evidence.)

Mr. Warren: May we stipulate that the contract that is in the pleadings may be accepted in lieu of this original contract?

Mr. Bennett: Yes.

The Court: All right.

Mr. Warren: Q. Mrs. Epperson, you are the plaintiff in the pending law suit?

A. Yes, I am.

Q. Would you state to the Court why you brought this law suit?

A. I brought this law suit because I have a Text Book which includes the theory about the origin or the descent or ascent of man from a lower form of animal. This seemed to be a widely accepted theory and I feel it is my responsibility to acquaint my students with it. It is basic to the study of the biology which I teach and/or biology in general and I feel that I should acquaint my students with it. However, I have been informed by my attorney and others that if I do teach it, [79] I am subject to criminal prosecution and dismissal from my job and being fired.

Q. Mrs. Epperson, a motion was filed by the Attorney General to require you to state what you wanted to teach your pupils with reference to evolution of man. Now, will

you tell the Court what it is that you want to teach your students?

A. I wish to teach them what is given in the Text Book that was provided by the School Administration.

Q. The Text Book that was provided for you for the purpose of your teaching biology by the School Administration?

A. Yes, sir.

Q. It has a chapter in it on the biology of man?

A. Yes, sir.

Q. And that is what you wish to teach your students?

A. Yes, sir.

The Court: Now, that gets to the question I raised in the preliminary statement. Does this book that is given to her by the School Board conform to the contract? Is it referred to in any way in the contract?

Mr. Warren: No, sir, the contract simply provides that— I don't know what the General had reference to in it.

[80] The Court: The contention on the other side, as I understood it, is she is violating the contract.

Mr. Warren: And the contention on our side is she is trying to comply with her contract and seeking the protection of this Court in complying with her contract.

The Court: Then your contention is by virtue of furnishing a Text Book which contains this theory, then that is a part of the contract?

Mr. Warren: That's right and she, under her contract, is under a duty to teach the material that is furnished her, but if she teaches it she is guilty of a criminal act.

The Court: I want to get in the record the facts here.

Mr. Warren: Q. Will you please identify the Text Book to which you have just referred?

A. This is the Text Book here.

Q. You teach biology in what grade, Mrs. Epperson?

A. In the 10th grade.

Q. In the 10th grade?

[81] A. Yes, sir.

Q. And this is the Text Book and shall we identify it by name?

A. The name is Modern Biology.

Q. And who is the Author?

A. James H. Otto and Albert Towle.

Q. That Text Book is the adopted Text Book for the teaching of biology in the 10th grade?

A. Yes, sir.

Q. Now what particular chapter in that book do you have reference to?

A. A chapter called "The History of Man," Chapter 39.

Mr. Warren: Your Honor, I have reproduced Chapter 39. I think everybody has the book. It has never been more popular than today. I would like to introduce this reproduction so that I will not encumber the record with introducing the entire volume.

The Court: Let it be introduced.

(Thereupon, said reproduction of Chapter 39, "The History of Man," was marked for identification as Exhibit No. 2 and received in evidence.)

[82] Mr. Warren: I shall not ask the witness to read this chapter at this time, simply because this is a matter of argument to be presented to the Court.

The Court: I understand.

Mr. Warren: What the book contains and what it means, etc. is a matter for presentation to the Court.

The Court: What I am trying to get clear here. Off the record.

(Off the record discussion.)

Mr. Warren: Q. Mrs. Epperson, have you taught this chapter yet? A. No, I have not.

Q. Do you intend to teach this chapter? A. I am under contract to teach what is in the text and it is in the text so, therefore, I intend to teach it.

Q. You intend to teach it?

A. Yes, sir.

Mr. Warren: That is all.

[83] Cross-Examination,

By Mr. Bennett:

Q. Mrs. Epperson, did you have anything to do with the selection of this particular Text Book you teach in biology?

A. A group of all the biology teachers in the system voted on various texts.

Q. When did you all do that?

A. Last spring.

Q. Have you had this book for one year or two years?

A. Just this year.

Q. And the book they had before, did they have a section on the Darwinian Theory?

A. It did not.

Q. It did not?

A. No, sir.

Q. So you were one of the individuals who voted to put this book in the public schools, is that right?

A. We voted for it.

Q. Ma'am?

A. We did vote for it, yes.

Q. So it was voluntary on your part, as far as Chapter 39 is concerned, that it is in the book that you now are trying to [84] teach, is that right?

A. Yes.

Q. Mrs. Epperson, how do you define academic freedom?

A. That would simply be a matter of personal opinion and I don't feel that my personal opinions are material.

Q. You allege it violates this restraint—I mean violates your academic freedom and do you have a definition of academic freedom that is in line with your allegation in your complaint?

A. In this case, yes, I feel that academic freedom in-

volves the subject which one is teaching; acquainting one's students with all of the important matters associated with a certain subject field and my subject field happens to be biology and one of the important concepts in biology is the theory of evolution and, therefore, I feel that I should introduce this.

Q. The Little School Board hasn't instructed you to teach this, has it?

A. No, they have not.

Q. Ma'am?

A. They haven't instructed me as such. The material is simply in the text.

Q. Chapter 39 is pretty well over in this book, isn't it?

A. Yes, it is.

[85] Q. You brought this law suit in November of last year?

A. December, I believe.

Q. Had you reached Chapter 39 when you brought the law suit?

A. No, I hadn't.

Q. But you made up your mind that you were going to teach this theory in contravention of the state law?

A. I knew the theory was there and that I would eventually come to it and I wanted to find out whether the law really was constitutional or not and what I should do when I got to it.

Q. You signed a contract with the Little Rock School Board on the 2nd day of July, 1965?

A. Yes, sir.

Q. And there is contained in this contract this paragraph: "Both parties hereto agree that this contract should be construed in accordance with all applicable laws and regulations governing the employment and compensation and conduct of teachers."

A. Yes.

Q. Do you know the significance of that particular paragraph in this contract?

A. I believe I do.

Q. Did you at that time agree to abide by the state laws?

[86] A. Yes, sir.

Q. Now you want to change that contract, is that right?

Mr. Warren: I object to this line of questioning. This lady is a citizen of Arkansas and has a right at any time to attack the validity of any statute and she has a right to the Court here in the determination of the constitutionality.

The Court: She wants to teach it, she says. This book which has been authorized or adopted by the School Board and in so doing she thinks she will violate the statute, if it is a valid statute. Therefore, she is questioning the validity of the statute.

Mr. Warren: In this Court of law.

The Court: Yes.

Mr. Bennett: Q. Mrs. Epperson, have you ever heard of a creature or skull that was found in Kenya, East Africa, in 1948, which in scientific circles was——

Mr. Warren: Just a minute. I object.

Mr. Bennett: [87] I haven't finished.

The Court: I don't know what the purpose of this is.

Mr. Warren: I object. I don't, either. That is the reason I am objecting.

The Court: State the purpose.

Mr. Warren: I think whether the Darwinian Theory is true or false has absolutely nothing to do with this law suit.

The Court: I don't understand that to be the question.

Mr. Bennett: The sole question of the law suit is whether or not the statute is reasonable. Now, she wants to teach only one theory and I can say this, Judge, there is over 40 different theories. Why should she be able to select the Darwinian Theory to the exclusion of all of the others?

The Court: I don't understand that she is. She may want to teach them all.

Mr. Bennett: She says she wants to teach only Chapter 39, the [88] Darwinian Theory.

The Court: She hasn't said she has refused to teach other theories.

Mr. Warren: I don't think he ought to be able to ask her about some particular skull or fossil.

Mr. Bennett: She is a master in geology and she ought to be able to say yes or no.

The Court: Say yes or no.

Mr. Bennett: Am I to understand the State can't ask this witness this question?

A. Yes, I have heard it.

The Court: Go ahead and answer.

Mr. Bennett: Q. Do you know what deduction Dr. William L. Strauss, President of the American Association of Physical Anthropologists in 1952, deduced from the discovery of the skull proconsul?

[89] Mr. Warren: I object to that question.

The Court: Objection sustained.

Mr. Bennett: Q. Do you know of any theory of evolution which teaches that a man evolved from a monkey and not the ape?

A. No, I do not know of any such theory.

Q. And you do not know whether or not that was Dr. Strauss' theory?

Mr. Warren: I object, Your Honor.

The Court: She said she didn't know.

Mr. Bennett: Q. You have never heard of any such theory that man evolved from the ape and not the monkey?

A. No.

Q. Just in short, what is your concept of Mr. Darwin's theory?

Mr. Warren: I object, Your Honor. What her concept of Mr. Darwin's theory is has absolutely nothing to do with this [90] law suit, or Mr. Bennett's concept or my

concept. She asked to be permitted to teach a chapter in the book assigned to her, which chapter collides and conflicts with this present statute.

Mr. Bennett: Q. You want to teach Chapter 39?

A. Yes, sir.

Q. That is on the Darwin theory?

A. Yes, sir.

Q. What is the Darwin theory?

A. The Darwin theory is one of the many theories about how organisms change over a long period of time.

Q. Not about the many theories. What is the Darwin theory?

A. It is a theory about how organisms change over long periods of time. It is one man's idea of what could cause these changes to take place.

Q. It is merely a theory?

A. Yes, it is.

The Court: I don't want to interfere with your question and imply I am trying to interpose my efforts to try the law suit, but I would like to ask this question, of whether or not you propose or plan to teach this theory in Chapter 39, I [91] believe it is of this book, do you propose to teaching that as a proved and established fact?

A. It is not a proved and established fact.

Q. Do you propose to teach it as a proved and established fact, which a child or student must accept, or do you propose to merely present it and explain it as an unaccepted theory?

A. I propose to explain it as simply a theory.

Q. You do not propose to teach it as an established fact which a child must accept?

A. No, I do not.

Mr. Bennett: Q. In your response, Mrs. Epperson, you use the word three times that you want to teach the Darwin Theory. And in your attorney's transmittal of Chapter 39, he used the word "teach" three times. Have you seen this letter from Mr. Warren to me?

A. No, I have not until now.

Q. Do you concur with Mr. Warren that you want to teach the theory?

Mr. Warren: Your Honor, I want to interpose an objection. In the first place, this is a letter of transmittal to the [92] Attorney General from me. I quite agree that I did use the word "teach". I think that I was unfamiliar with all of the definitions of teach, as is the Attorney General, but whatever the word "teach" means is a matter of law, not a matter of cross-examination of this witness.

The Court: I think that is correct. I think it is proper to examine the witness about what, in fact, she proposes to do.

Mr. Warren: And you asked her and she answered that question.

The Court: The defimition of the word would be a matter of conclusion.

Mr. Warren: All right.

Mr. Bennett: Q. In response to motion of the State of Arkansas to say what you want to teach, this language is used: "The Plaintiff desires to teach and believes she has a constitutional right to teach the following statements of the history of man." Now, in your original complaint you said you wanted to explain the Darwin Theory and there you say you want to teach it. [93] Will you tell the Court the difference between explaining something and teaching something?

A. That is a matter of one's personal interpretation, really. There are many definitions of the word "teach" and many definitions of the word "explain".

Q. You teach arithmetic. That is a definite set science?

A. I'm sorry.

Q. You teach arithmetic?

A. Yes.

Q. But do you explain biology or do you teach biology?

A. You can do both. You can explain arithmetic or you can teach arithmetic.

Q. Will you tell the Court what you want to teach or explain to these students?

Mr. Warren: We are haggling with the witness. We have introduced exactly all she wants to teach them.

Mr. Bennett: I did not object to any question Mr. Warren asked.

Mr. Warren: I didn't ask any improper questions. (Laughter)

The Court: Ladies and gentlemen, I hope we won't have to have the Sheriff clear this court room and I do not want [94] any more of this outbursts of laughter or applause or anything. This is not a matter of public demonstration, although some people seem to indicate it might be, but it is far from that. This is a serious matter. It is merely testing the constitutionality of the validity of an Act under the Constitution of the United States and the Constitution of the State of Arkansas and that is what is before this Court and all that is before the Court and I think we ought to be dignified about it and have no laughing or demonstrations about what any attorney or anyone else said or does in this case. I hope that will be sufficient. Go ahead.

Mr. Warren: I interposed an objection that the word "teach" has many connotations.

The Court: I understand that and I don't think we need to go any further to explain what they mean by the word "teach", "theory" or otherwise. She has placed in the record here as Exhibit No. 2 what she proposes to teach and that speaks for itself.

Mr. Bennett: I asked her the question. I asked her what she wanted to teach and what is the Darwin theory and she hasn't [95] answered yet.

The Court: Go ahead.

Mr. Warren: She went into great length answering that. I submit just a moment ago she answered it.

The Court: She has been replying to your questions quite consistently. Go ahead, if you have another question to ask her.

Mr. Bennett: Q. Do you know of any theory of evolution that man evolved from an algae?

A. Not exactly, no.

Q. Do you know of any theory that man evolved from seaweeds?

A. No, sir.

Q. You have never been acquainted with that theory?

A. Not as a strict theory as such, no, sir.

Q. Have you been in your studies acquainted with the new knowledge brought forth about the cell structure of man as contrasted to the cell structure of other animals and vegetables?

Mr. Warren: I object to that. I hate to jump up here, but he [96] is simply testing this lady's wide range of knowledge. That is not the question involved here by the Court. There may be a thousand theories this lady never heard of.

Mr. Bennett: Why should she want to teach only one theory?

Mr. Warren: Because it is in the book.

The Court: I think your objection is well taken.

Mr. Bennett: Q. Are there many dozen different theories of evolution?

A. I am sure there must be, yes, sir.

Q. But you want to teach only one?

A. I want to teach the theories to my students which seem to be widely accepted and which seem to be supported by most scientists.

Q. What would you do if a parent wanted you to teach another theory?

A. That is what a parent wants me to teach and that is not my employer.

Q. So, you are going to trust your judgment only as to what the students should be taught?

The Court: [97] No. She used the word "employer".

Mr. Bennett: That's right, but her employer hasn't authorized her to teach Chapter 39.

The Court: I understand he had.

Mr. Bennett: Q. Has the Little Rock School Board told you to teach Chapter 39?

A. No, sir, not in words.

Q. Who instructed you otherwise to teach it?

The Court: Wait. Let's get this clear. Do I understand you to say the Board has authorized you to teach the book which contains Chapter 39?

A. Yes, sir, they have.

Mr. Bennett: Q. I thought you told me the teachers selected this book, not the Little Rock School Board?

A. The teachers voted on the book.

Q. Did anybody on the Little Rock School Board, or your Superintendent, or your Principal, instruct you to teach or not teach Chapter 39?

[98] A. They have not given me a written statement saying to do this, no. They have simply provided me with a book which includes this Chapter.

Q. That you have helped select?

A. Yes, sir.

Q. Do you know whether or not your Superintendent or Principal saw this book before it was distributed to the students?

A. No, I do not. I am sure they did, though.

Q. They did.

A. I do not know.

Q. Who is the Principal you think saw it?

A. The Principal is—of my school now?

Q. Yes.

A. The Principal is Mr. Harry Carter now.

Q. Harry who?

A. Carter.

Q. Do you think he has seen Chapter 39?

A. I imagine he has.

Q. Before it was adopted by the teachers?

Mr. Warren: I really don't think that is material.

The Court: [99] No, it is not material at all. It doesn't control what the Board does and what they base their method of adopting books on.

Mr. Bennett: Q. You have no authority from the Little Rock School Board to teach Chapter 39?

A. Except for the fact that it is in the book.

Q. It is in the book and if some parents wanted you to teach another theory of evolution besides the Darwinian Theory you would not teach it, is that correct?

A. I would not teach it without going through channels involving my employer and finding out if this was the sort of thing they would have me teach.

Q. Mrs. Epperson, this whole case turns on a statute passed in 1928. I was a child and I am sure you probably wasn't here at that time?

A. Yes.

Q. And, of course, it is whether or not the statute is a reasonable exercise of the power of the people?

A. Yes.

Q. To legislate. Now, there is a lot of people that think that the theory of evolution is diametrically opposed to other religious teachings as to the creation of man. Do you thinking—do you think the teaching of evolution teaches an [100] atheistic doctrine?

Mr. Warren: I object, Your Honor.

The Court: Mr. Bennett, as I gather from the statement of counsel in the opening of this case, I think you in substance agree that the question before this Court is not whether the theory of evolution is true or false, or what anyone thinks about it. That has nothing to do with this case. It is not a question of whether the creation of man as contained in the Bible, or Book of Genesis, is true or untrue. That question is not before this Court. It is a question of the validity of this Act as to whether or not it is reasonable and constitutional. So, these questions to

this witness, or any other witness, as to what they think or believe about the Bible or evolution, I think is immaterial to the question before this Court.

Mr. Bennett: I didn't ask her about the Bible.

The Court: You did ask her about evolution. What she believes or disbelieves about the theory of evolution, I don't think [101] is material to the issue in this case.

Mr. Bennett: I want to see if she thinks it is a reasonable statute.

The Court: You might discuss it indefinitely, but I think we ought to confine our questions in the testimony to questions material to the issue in this case.

Mr. Bennett: Q. You don't have any children, do you, Mrs. Epperson?

A. No, sir.

Q. Do you think that your employer should be able to exercise some restraint over your activities?

A. Yes, I think so.

Q. And is it your feeling that the School Board has restrained you from teaching Chapter 39?

Mr. Warren: I object, Your Honor. She didn't so testify.

The Court: It is quite the opposite. She testified the School Board had authorized her to teach it because it is contained in this text book.

Mr. Bennett: [102] I didn't hear her say the School Board authorized her to teach it.

Mr. Bennett: Q. Do you have any letters or memorandum authorizing you to teach this?

A. No, sir.

The Court: Not the specific chapter, but the book. She is authorized to teach the book.

Mr. Bennett: The whole thing disputed is Chapter 39.

The Court: It is in the book that she says the Board has authorized her to teach. Am I correct?

A. Yes, sir.

Mr. Bennett: Q. You are well aware of the state law that says you shall not teach it?

A. Yes, sir.

Mr. Warren: We have been over this time and time again.

The Court: She has answered the question.

The Court: [103] Go ahead, if you want to cross-examine her.

Mr. Bennett: Q. I asked her if she had any authorization from your Principal or your Superintendent, in writing or orally, saying you could teach Chapter 39?

Mr. Warren: To my certain knowledge, that is the third time.

Mr. Bennett: Let her answer the question.

Mr. Warren: She has answered it twice.

The Court: She answered it by saying if you want to question the fact of whether or not Chapter 39 is contained in the book.

Mr. Bennett: Are you just going to stand up and object all the time?

Mr. Warren: Whenever you ask an improper question I am going to object.

Mr. Bennett: Q. Answer the question yes or no.

A. No, I do not.

[104] Mr. Bennett: Q. This theory is highly controversial?

A. Yes, sir, it is.

Q. It has been for years and years, since Mr. Darwin wrote it?

A. Yes, sir.

Q. You know the majority of the people of the State of Arkansas——

The Court: Mr. Bennett, I don't want to unduly restrict you and want to let it be understood at the outset this Court is not unmindful of the public interest in this case, or the concern of many people, but I see no reason to just carry on, and question her, or argue in a way with the witness as to what she believes.

Mr. Bennett: I have not argued with the witness.

The Court: You are indicating that you are discussing with her what she believes or disbelieves, or doesn't think. Confine it to the issue in this case.

Mr. Bennett: The people in this state are interested in this [105] law suit.

The Court: I just said so.

Mr. Bennett: I am entitled to ask this witness certain questions.

The Court: There are certain questions you are not entitled to ask her, also.

Mr. Bennett: Between Mr. Warren's objections and—strike that.

Q. Mrs. Epperson, in this book you have a chapter on genetics?

A. Yes, sir.

Q. Do you teach that?

A. Yes, sir.

Q. In that chapter on genetics, do you teach anything about chromosomes?

A. Yes, sir.

Q. Do you all look at cells of animals and vegetables over there under the microscope?

A. Yes, sir, we do.

[106] Q. Is there anything you found out in your courses in biology and zoology which shows that the human cell is in any way similar to an animal cell?

A. Yes, sir.

Q. But they are always human cells, aren't they?

A. Yes, sir.

Q. Have you been taught in your courses that like species produce like species?

A. On the whole and largely, yes.

Q. On the whole and largely. Give me some examples of specific exceptions?

Mr. Warren: Your Honor, I hesitate to continue object-

ing, but we are wandering far afield here. This young lady is not on trial for her proficiency.

Mr. Bennett: I am not questioning that.

Mr. Warren: You are.

Mr. Bennett: We are asking about something she teaches in the school, chromosomes.

Mr. Warren: [107] That has nothing to do with the issues in this case.

The Court: I think on cross-examination it might go to the point of whether she is teaching something different than what is in the book. He might question her along that line.

Mr. Bennett: Q. Give me some examples, if you can, Mrs. Epperson, where the cell structure of a human being is similar or exactly like the cell structure of a lower animal or a vegetable.

A. The cells of certain organisms are similar.

Q. What organisms?

A. Organisms in various species.

Q. What species?

A. Humans.

Mr. Warren: I want to interpose this objection at this time. Mr. Bennett is trying to get from this witness some statement that he thinks will open the door and load this record with a lot of so-called scientific theory and testimony. That is the reason I am continuing to object. It is completely [108] immaterial, completely irrelevant, and he is trying to use it later on to say she by her testimony invited his irrelevant testimony later on.

The Court: Well, the chapter or the theory that she proposes to teach or explain or present is in the record. Now, if he wants to ask her something that goes to the question of whether or not she is confining her teaching to that or something contrary to it, I think for that purpose it might be admitted, but not for other purposes.

Mr. Bennett: Q. Mrs. Epperson, the theory of evolution

is simply that the survival of the fittest is the law, is that right? A. That is an idea which Darwin had.

Q. Didn't Professor Nietzsche, in Germany, also propose that, which led to a theory of the superman race?

A. I am not sure.

Q. You have not heard of Professor Nietzsche?

A. How do you spell it?

Q. N-i-e-t-z-s-c-h-e.

A. I believe I have heard the name, but I am not familiar with the theories he may have come up with.

Q. The Darwin Theory is that the survival of the fittest [109] is the law of nature?

A. This is Darwin's concept, yes, sir.

Q. And you subscribe to that?

Mr. Warren: Just a minute. I object again. Her personal beliefs have nothing to do with it.

The Court: Objection sustained.

Mr. Bennett: Q. Are you teaching the survival of the fittest to the children over there in the 10th Grade?

A. I have not gotten to that chapter.

Q. You have read the chapter?

A. Yes, sir.

Q. Are you going to teach them that?

Mr. Warren: The chapter speaks for itself. We put that in the record. She says all she intends to teach the children is what is in the chapter.

Mr. Bennett: Q. That is the chapter that says the survival of the fittest is the Theory of Darwin?

A. Yes, sir.

[110] Q. And you are going to teach that?

A. Yes, sir.

Q. Can you tell me what the transmutation of the species means?

A. That again is a matter of my own personal ideas and the study I have made on the subject and I don't feel my personal view on this would be material.

Q. A simple definition of the theory of organic evolution is the transmutation of the species, is that correct?

A. Approximately so.

Q. And the Theory of Darwin is that there was a single common ancestor, is that right?

Mr. Warren: I again want to object. What she is going to teach is in the book, Chapter 39.

The Court: I understand that. He is cross-examining her.

Mr. Bennett: I am finding out what she wants to teach.

Mr. Warren: He is not asking her what is in Chapter 39. He is asking her about Nietzsche and what Darwin taught, etc. If he will confine his cross-examination to what is in Chapter [111] 39, I have no objection.

The Court: All right. Go ahead.

Mr. Bennett: Q. Now, a protozoa is an infinite cell, is that right?

A. One cell animal. I would say it is finite.

Q. It is a one cell micro-organism?

A. Right, one cell.

Q. And I believe in the laboratories you all breed them constantly and it has a life expectancy of about 16 or 18 days, is that right?

Mr. Warren: I object to that. What goes on in the laboratory has nothing to do with it.

The Court: If it has to do with teaching of what is in this book he can ask about it.

Mr. Bennett: Did you read Chapter 39, Mr. Warren?

Mr. Warren: Yes, sir, I copied it off for you.

Mr. Bennett: Q. Mrs. Epperson, do you believe that like species produce [112] like species only?

Mr. Warren: I object, Your Honor.

The Court: Objection sustained. It is not a question of what she believes. If you have some questions.

Mr. Bennett: Have you read Chapter 39, if it please the Court?

The Court: If you are requesting this witness to show she is teaching something that is not contained in Chapter 39, go ahead, but she says she is going to teach it and doesn't propose to teach anything contrary to it. I don't believe she said she is teaching it, but she proposes to teach it if it is legal to do so.

Mr. Bennett: Q. Who is Dr. and Mrs. L. S. B. Leakey?

A. I believe they would be called anthropologists, probably.

Q. Have you read any books by them?

A. I don't believe I have.

Q. They are prominently mentioned in Chapter 39?

A. Yes, sir.

Q. And they are quoted as excavating and studying fossils, [113] I believe in South Africa, around Tanganyika. Have you checked to see what their deductions were?

A. Well——

Mr. Warren: I object.

Mr. Bennett: I want to find out about Dr. Leakey.

Q. You are going to teach about him?

A. I know he is an Anthropologist and I wish to acquaint my students with what is in the chapter.

Q. But you are going to take it for face value, everything Dr. Leakey says?

A. No, sir, I have read in other places about Dr. Leakey and his wife. Not books that they wrote, but I have read in other books about them.

Q. Is there anything in Chapter 39 about the Piltdown Man?

A. I believe it is mentioned as a possible hoax.

Q. That was a fossil found in Sussex, England?

A. I believe so.

Q. It was a planted fossil I think that was later on found out, is that correct?

A. Yes, sir.

[114] Q. So for many years the scientists believed in the

Piltdown Man only to find out it was a hoax, is that correct?

A. Yes, sir.

Q. Have you ever seen a picture of the Australophithecus?

A. Sir?

Q. Have you ever seen a picture of the Australophithecus? Have you ever seen a model of that particular animal?

A. I believe I have.

Q. Where is that?

A. I believe there is a picture of it in the book.

Q. You said you have a picture there. What do they call him?

A. According to the text, Australophithecus was considered a dead end.

Q. Is there still a missing link between the Darwin theory and the age of life?

A. Yes, sir.

Q. Creation.

A. I am not sure I understand what you mean.

Q. There is also some researching in Chapter 39 and also some Gorilla heads, is that right?

A. I believe they do.

Q. Ma'am?

[115] A. Yes, sir.

Q. Is there anything in Chapter 39 which says that modern day man descended from these?

A. The Chapter states that Darwin had a theory on this idea.

Q. But there has been ng proof of it?

A. Oh, no, sir.

Q. Have you attended the American Museum of Natural History?

Mr. Warren: I object.

The Court: Objection sustained.

Mr. Bennett: Q. You have heard of conflicting theories, haven't you?

A. Yes, sir.

Q. Are you going to teach those?

A. Surely.

Q. What theories are those you are going to teach besides Darwin's?

A. One theory which I have already taught to my students was the theory of spontaneous generation, the idea that matter such as rags or something could give rise to mice.

[116] Q. Rags can give rise to mice?

A. That is a theory which has been disproven. It is simply an interesting theory in the study of history of biology and one thing we tell our students about it. We also go through the work and the experimentation of men who disproved this theory and show how they disproved it and, of course, we believe now that life comes only from preceding life.

Q. I believe in Chapter 39 they talk about the Java Man, don't they?

A. I believe they do.

Q. What particular part of an anatomy of someone or some animal was found and later on adding some plaster paris casts to it was called the Java Man? What part of the anatomy?

A. I believe it was part of the skull.

Q. Part of the skull? The top or lower?

A. I don't know. I'd have to look it up.

Q. Do you have out there as additional material for the students any figures showing the skeletons of various—any pictures, I mean, showing the skeletons of various animals as contrasted with man?

A. I don't believe these are shown in the book, except for the skulls that were shown, pictures of the skull.

[117] Q. Back on page 544 of the book it shows Dr. L. S.

B. Leakey examining a skull of some kind of a creature. Have you investigated to see if that was a complete skull that he is looking at, or if it was a jaw bone and a skull built around it?

Mr. Warren: I object.

The Court: All of these questions are immaterial. You can ask her some questions on cross-examination if you are trying to show here that possibly she is not following or teaching what is in the book.

Mr. Bennett: I want to see how far she has gone to ascertain what in this book she is going to teach the pupils of the State of Arkansas.

Mr. Warren: I object.

The Court: Objection sustained.

Mr. Bennett: Q. Mrs. Epperson, if the theory of Darwin is a false [118] theory is it still reasonable to teach it?

Mr. Warren: I object to that. That is certainly a question of law.

Mr. Bennett: It is a question of fact or whether or not it is false or true.

Mr. Warren: You didn't ask her if it was false or true. You said if it is false is it reasonable for her to teach it. That is for the Court to determine.

Mr. Bennett: Q. You don't know whether it is false or true, do you, Mrs. Epperson?

A. No, sir.

Q. Who sets the curricula out there at the school?

A. I imagine the school administration does.

Q. Is it mandatory that these children take biology?

A. I believe they have to have it to graduate.

Q. They have to have it?

A. Yes, sir.

Q. Is it mandatory that the children go to school in Arkansas [119] until they are 16 years of age?

A. Yes, sir. That is my understanding.

Q. Have you talked to the Principal or the Superintendent about this matter since the filing of this law suit?

Mr. Warren: I object, Your Honor. It is thoroughly immaterial. It is completely immaterial for him to bring somebody else into the law suit that is not properly in it.

The Court: She said she proposes to present or teach or explain this theory under the authority of the school officials. If the question is directed to that statement, he might ask her.

Mr. Bennett: That's right.

Q. This is April and school is almost out and you have not taught Chapter 39?

A. No, I have not.

Q. Have you talked to your Superintendent or Principal about teaching it?

A. About teaching it?

Q. Yes, sir.

[120] A. No, not about teaching it.

Mr. Bennett: That is all.

Mr. Warren: I have no further questions, Your Honor.

The Court: Do you have any questions, Mr. Friday?

Mr. Friday: No questions.

The Court: You may stand aside.

(Witness Excused.)

[121] HUBERT BLANCHARD,

Intervenor herein, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Warren:

Q. Will you please state your name?

A. Hubert Blanchard.

Q. Where do you live, Mr. Blanchard?

A. 3417 Pope Avenue, North Little Rock.

Q. Where were you born?

A. Sulphur Rock, Arkansas.

Q. Where?

A. Sulphur Rock. That is in Independence County.

Q. Are you married?

A. Yes, sir.

Q. Do you have children?

A. Yes, I have two sons age 15 and 17.

Q. Age 14 and 17?

A. 15 and 17.

Q. 15 and 17?

A. Yes, sir.

Q. What is your occupation, Mr. Blanchard?

A. I am Assistant Executive Secretary of the Arkansas Education Association.

[122] Q. You appear here in your individual capacity as a citizen and taxpaper?

A. Yes, sir.

Q. And not as an official of the A. E. A.?

A. Correct.

Q. Give me a short history of your education, Mr. Blanchard.

A. I attended elementary school and graduated from high school at Egypt, Arkansas. I attended the University of Arkansas. I have a bachelor's degree and a master's degree from the University and a diploma for advanced study in the School of Administration, all from the University.

Q. Now, what was your occupation prior to your present position that you hold?

A. I was a County School Supervisor.

Q. You are the Intervenor in the present law suit?

A. Yes, sir.

Q. Mr. Blanchard, in your intervention you asserted that you wanted your children to have the benefit of scientific knowledge, or scientific theories. You felt that your children had a right to learn. What scientific theories do you want your children to have the right to be taught?

A. I have a 15 year old son in the 10th grade who is taking [123] biology. They have the same text in North Little Rock. I want him to have the material, that is, to be exposed to the material that is in the text.

Q. That is the same book that Mrs. Epperson is using here?

A. Yes, sir.

Q. Now, with reference to the 17 year old, what do you feel that is right or at least legal for him to be taught?

A. To have a background of scientific information in college, I am interested in this for both of them, a broad, general education, including thorough grounding in science, including the material on evolution that is contained in the text books that are being used now in some of the private colleges in the state.

Q. Now, just what private colleges do you have reference to?

A. I have excerpts from text books that are being used in the course in biology at Ouachita Baptist College, Arkansas Baptist College at Conway. There is material in there that I think is essential to complete an education in the field of science.

[124] Q. One of those text books is edited by an Arkansas man, isn't that correct?

A. Yes, sir.

Q. Is that text book also being used at State Teachers College?

A. Yes, it is being used at State Teachers College and Arkansas Baptist College. The author is professor of biology at State Teachers College.

Q. Do those excerpts which you have from those text books contain explanations of the Darwin Theory of the ascent of man?

A. Yes, they do.

Mr. Warren: I would like to introduce these and ask that they be marked as Exhibit No. 3.

The Court: Let it be introduced.

(Thereupon, said excerpts were marked for identification as Exhibit No. 3 and received in evidence.)

Mr. Warren: I believe that is all.

Cross-Examination,

By Mr. Bennett:

[125] Q. Mr. Blanchard, you have been a school official and a school administrator for a number of years, is that right?

A. Yes, sir.

Q. Is it your belief that the school officials must have some uniform school curriculum to go by?

A. I think the school curriculum is best determined by school officials.

Q. I think so, too.

A. With the help of their teachers.

Q. By school officials and not the teachers, is that right?

A. I say with the help of the teachers. The teachers have a role in it. So do the school administrators.

Q. You know of our statute which makes it mandatory to teach the effects of alcohol and narcotics on the human body, in our public schools?

A. I have heard of such a law, I believe.

Q. Do you know of a statute on our books passed by the legislature which makes it mandatory that American History and Arkansas History be taught in the schools?

A. I believe so.

Q. Those are affirmative statutes saying we must teach those subjects and it is your opinion, the way I get it in your complaint, that you think the school's curriculum—I will quote from your Intervention: ". . . that scholars be [126] informed of what may not be believable, as well as what may be believable and academic freedom to learn demands that the scholar, and not a political majority, shall have the right to select what to him is believable and

what is not believable." Is that your attitude as a school man?

A. Yes, sir.

Q. Would you object if some teacher wanted to teach your children under the guise of academic freedom a theory that God is dead?

A. I don't believe that is pertinent to this case.

Q. You want to open the class rooms up for the teaching of various theories, is that right, to be selected by the teachers?

A. Within reason, yes.

Q. All right. Have you heard of more than one theory of evolution?

A. I am not sure that I have.

Q. You have not heard anything but the Darwin theory, is that right?

A. Darwin, as I understand it, is just a part of the theory of evolution. Evolution is much broader.

Q. Have you read Chapter 39 of this book that your children bring home? Have you read Chapter 39?

[127] A. Yes, sir.

Q. Does it mention any other theory of evolution in there besides Darwin's theory?

A. I didn't find it.

Q. So you want them taught the Darwin theory to the exclusion of all the other theories, is that right?

A. The law does not exclude teaching the other theories.

Q. The law excludes teaching any theory, doesn't it?

A. No. The law excludes teaching that man ascended or descended from a lower order of animals.

Q. Which is the theory of evolution, is that right, being frank about it?

The Court: He says it is a part of the theory, not the whole theory.

Mr. Bennett: Q. That is the way you interpret it, isn't it?

Mr. Warren: I object to his interpretation. It has absolutely nothing to do with it.

Mr. Bennett: Q. As a school man, the statement that you think the curriculum should be set by the teachers——

[128] Mr. Warren: Objection, Your Honor. He didn't make that statement.

Mr. Bennett: I quote from the allegation in the Intervention, sir.

The Court: Go ahead.

Mr. Bennett: Q. That says this: ". . . that scholars be informed of what may not be believable, as well as what may be believable and academic freedom to learn demands that the scholar, and not a political majority, shall have the right to select what to him is believable and what is not believable."

Mr. Warren: That has absolutely nothing to do with the statement you made that he said a curriculum should be selected by the teachers.

Mr. Bennett: Q. How do you think they ought to select the curriculum?

Mr. Warren: I object.

The Court: He is withdrawing that question, as I understand [129] it and propounding another one.

Mr. Bennett: Q. Who do you think should select the curriculum to be taught to the 10th Grade of the School of North Little Rock, the school board or the teachers?

A. The teachers and the school administration.

Q. You have been a superintendent of schools?

A. Yes, sir.

Q. When you made up the curriculum for your school, it was adopted by the school board, is that right?

A. The school board has very little to do with the curriculum. They may have approved it.

Q. They approved it, is that correct?

A. They may or may not. I think probably in most school districts they do.

Q. Did they approve yours?

A. I think so.

Q. When you were superintendent of the school you didn't let the teachers teach anything they wanted to, did you?

The Court: You are getting into the field of what the school board authorizes or delegates the authority to do. [130] Mr. Bennett: There must be some uniform system of conducting the schools and somebody has to administer the schools. Mrs. Epperson testified she doesn't have any written or oral authority permitting her to teach Chapter 39 and the school board has not instructed her to teach it and the State law says she shall not teach it. Now, Mr. Blanchard comes along——

The Court: Just a minute. He said the school board either approves or gives the administrators and the teachers authority to set up the curriculum.

Mr. Bennett: I asked who approved the curriculum and he said the school board.

Mr. Warren: No, he didn't. He said sometimes they did and sometimes they didn't. Quote my witness right.

Mr. Bennett: Q. When you were superintendent of schools—let's go back. Before you went with the A. E. A. did you as superintendent make up a curriculum to be taught in the schools that you were administering?

[131] A. Yes, but I never made it up by myself.

Q. All right.

A. Teachers were involved in it.

Q. The prime responsibility for the curriculum was yours, is that right?

A. Correct.

The Court: Was that responsibility delegated to you by the school board?

A. Yes, it was.

Mr. Bennett: Q. So the ultimate responsibility for the curriculum is the elected school board?

A. Yes, I would think that is so.

Q. And the teachers were employees of that school board and that school district?

A. Yes.

Q. And did you have control of the teachers as superintendent, during the hours for which they were employed, during school hours?

Mr. Warren: I object.

The Court: [132] I don't think that has a thing to do with this.

Mr. Bennett: It has very much to do with it, an employer and employee relationship.

The Court: As I understand it, you say you set up the curriculum under the authority of the board, but did you say that you would not adopt or use a curriculum against the wishes of the board?

A. Yes, sir, that is correct.

Mr. Bennett: Q. The teachers were under your employment during the school hours, is that right?

A. Yes.

Q. And you, as superintendent, supervised them, is that right?

A. Yes.

Q. And there was an employer-employee relationship, is that right?

A. I suppose so.

Mr. Warren: I object, Your Honor.

Mr. Bennett: Q. Did your teachers sign a contract of employment?

[133] Mr. Warren: I object again, Your Honor. What does this have to do with what happened in Pocahontas or Walnut Ridge, wherever you were school superintendent?

Mr. Bennett: He was a school superintendent and the same state laws apply to him as anybody else.

Mr. Warren: He did not qualify as a school superintendent, but as a citizen and individual.

Mr. Bennett: Q. Didn't you say awhile ago you have been a school superintendent?

A. Yes, but I am appearing here in the role of a parent and taxpayer.

Mr. Warren: I was an employee of the U. S. Navy, but I am here as a lawyer today. It makes no difference what he has been.

The Court: That's right.

Mr. Bennett: Q. Don't you think it is important to know what constitutes an employer-employee relationship?

[134] The Court: Mr. Bennett, he has answered your question by saying that he helped, with the teachers and other administrative officials, set up a curriculum under the authority of the school board.

Mr. Bennett: He wants the teachers to set up a curriculum.

Mr. Warren: That statement isn't true. The intervention says the child has a right to believe what he wants to believe and I think that is the American way.

Mr. Bennett: Q. What do you mean when you state: ". . . and academic freedom to learn demands that the scholar . . ." You are talking about your two children?

A. Yes, sir.

Q. ". . . and not a political majority . . ."

A. Yes, sir.

Q. An elected school board, is that correct?

A. No, that is not the political majority we are talking about here. We are talking about the political majority that voted for the evolution law.

Q. ". . . shall have the right to select what to him is believable and what is not believable . . ."

The Court: [135] It doesn't say whether it shall be taught or not taught. It says whether he believes or does not believe. That is entirely different.

Mr. Bennett: Q. If you don't propose but one theory, how can—when there is 40, how can you make a decision as to whether it is believed or disbelieved? If you don't propose but one theory, how do you know whether it is believable or not?

The Court: You will have ample time to argue this case after the testimony.

Mr. Bennett: Q. So you want taught one theory only?

A. I have not said that.

Q. The only theory in the book is the Darwinian theory, isn't it, sir?

A. I want them taught what is in their book.

Q. That is the book your children are studying?

A. And when they get to college I want them taught what is in these books.

Q. But this is the book that we are talking about now and you want them taught only one theory, is that right?

A. There is only one theory outlawed as I understand it and that is what we are talking about.

[136] Q. You think as a school official and former superintendent of schools that the mere fact that Chapter 39 is in that book, they should authorize its teaching in contravention of state law?

Mr. Warren: I object.

The Court: That is a conclusion and the objection is sustained.

Mr. Bennett: Q. You are the parents of some children?

A. I have two of them.

Q. And it is your assertion to this Court that one parent's wish should control over the great majority of the rest of the people of the State of Arkansas?

Mr. Warren: Your Honor, the question involved here is whether a citizen of the State of Arkansas has a right to attack the constitutionality of a statute and apparently the Attorney General seems to think that if a person avails himself of that constitutional right he has committed a heinous wrong. I see nothing despicable about a citizen coming into this Court and asking this Court for his determination of the constitutionality of the law. [137] You said did he think it was right for one party——

Mr. Bennett: That is his allegation.

Mr. Warren: He is a parent that attacks the validity of that law and he has that right.

The Court: He has the right to attack it.

Mr. Bennett: I think he does.

Mr. Warren: All right, don't criticize him for it.

Mr. Bennett: Q. You have not read Chapter 39, have you?

A. Yes, sir.

Q. Have you had any courses in biology?

A. Yes, I have.

Q. How long ago?

A. The late 30's.

Q. The Darwin theory was in the book then, wasn't it?

A. I don't know. I don't remember.

Q. Where did you get exposed to the Darwinian theory?

[138] A. It is in books in the library. You can find it in innumerable places.

Q. You have never been at—in a class room where it was taught, have you?

A. No, I have not.

Q. So you have never had it explained to you or taught to you, you have just read it?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. And you are a school man and this is something that I have always wondered. What do you mean by "academic freedom?"

Mr. Warren: I object, Your Honor. "Academic freedom" is a question of law.

Mr. Bennett: That is a phrase they all use. I would like to find out what it is.

Mr. Warren: The truth of the matter is you pulled that out of the hat in cross-examining him.

The Court: I don't think you ought to ask the question of what he means by the use of terms.

[139] Mr. Bennett: I think it is very basic to find out

what they mean when they say "academic freedom". Does that mean freedom to teach without restraint?

Mr. Warren: "Academic freedom" is not contained in the complaint. I will be happy to explain it to General Bennett when we argue the case.

Mr. Bennett: Q. Do you think as a parent and as a citizen of this state that all theories, believable and unbelievable, should be brought into the class rooms of this state as theories?

Mr. Warren: I object, Your Honor.

Mr. Bennett: I want him to answer that question, Judge.

Mr. Warren: I know that you do and I don't want him to. That is an improper question.

Mr. Bennett: That statement comes from the intervention that said the children had the right to select what was believable and unbelievable.

The Court: [140] He has testified what he proposes to do, is to operate under the direction and authority of the school board and the curriculum that is set up by the board, together with the teachers and administrators and I assume he wouldn't want to teach some other.

Mr. Bennett: Q. Mr. Blanchard, here is your Intervention, signed by your attorney and on page two, along at the bottom, you use the words, "academic freedom to learn". What do you mean by "academic freedom to learn"?

Mr. Warren: I object. That is a legal term and we will discuss it.

The Court: It is a legal term, but if he has an answer, go ahead.

The Witness: A. "Academic freedom" means the freedom to—of the teacher to teach the material that is in the prescribed curriculum in the text book.

Q. Did you say "prescribed curriculum"?

A. Yes, and in the text book. Biology is a part of the prescribed curriculum of the North Little Rock Schools [141] where my children attend schools.

Q. That's right.

A. And the school has adopted this text book, which means I assume they have adopted what is in it. So "academic freedom" is the freedom of the teacher to teach that, the children to study it, and then make up their minds what they want to believe.

Q. And ignore the state law?

Mr. Warren: Objection, Your Honor.

Mr. Bennett: He says teaching of what is in the book and the state law says you shall not teach it.

The Court: That is the reason for this law suit.

Mr. Bennett: Q. And I am asking you if, under your interpretation of "academic freedom", it means teaching what is in that book and ignoring the state law? Is that your idea?

Mr. Warren: The Intervenor brought this law suit to determine the constitutionality of it. He doesn't propose to teach it [142] if it is contrary to the law, but he is testing the validity of the law. That is all there is to it.

The Court: He doesn't think the law is valid and he brought the suit. That answers your question, doesn't it? If the law is valid then he will not teach it.

Mr. Bennett: The question was what he means by "academic freedom" and he started explaining it.

The Court: He did, as I understand.

Mr. Bennett: Q. Let me ask you this way then. Do you believe that "academic freedom" means that the curricula should be set by the school teacher and not the elected school authority?

Mr. Warren: He has answered that. He has answered it three times.

A. I think I have answered that question.

Mr. Bennett: Q. Answer it again.

A. By the school——

Mr. Warren: [143] There is no sense in heckling this witness.

The Court: Let him repeat his answer and you can save time.

A. By the school administration, with the participation of the teachers, subject to the approval of the Board of Education.

Mr. Bennett: Q. Do you know whether or not the North Little Rock School Board approved Chapter 39 for teaching over there?

A. I do not. I doubt that the Little Rock—I mean the North Little Rock School Board has seen Chapter 39.

Q. Has your children come to you and said, "we are not going to be taught Chapter 39"?

A. They came up to Chapter 39 and skipped it.

Q. When did they come up to Chapter 39? This law suit was filed in December.

A. I don't know, but they are past Chapter 39 now. It has been skipped.

Mr. Bennett: I believe that is all.

Mr. Warren: I have no further questions.

Mr. Friday: No questions.

(Witness excused.)

[144] Mr. Warren: The plaintiff rests, Your Honor.

Mr. Bennett: In order to make a record, I have an authenticated copy of Initiated Act No. 1, by the Secretary of State—prepared by the Secretary of State, which I would like to introduce.

Mr. Warren: No objection.

The Court: Let it be introduced.

(Thereupon, said authenticated copy of Initiated Act No. 1 of 1929 was marked for identification as Exhibit No. 1 and received in evidence.)

Mr. Bennett: I have another authenticated copy of Act 168 of 1937, which makes it mandatory to teach the effects of alcohol and narcotics on the human system in the schools of Arkansas.

Mr. Warren: I object, because it encumbers the record. If one of these parties appeal they will have to reproduce this at considerable expense and the law of Arkansas is that the enacted Acts of Arkansas are all part of the record. [145] There is no necessity of encumbering that record with that and that is the only purpose of it.

Mr. Bennett: Let's see how much you encumbered it. Here is nine pages and I want to introduce five pages.

Mr. Warren: All he has to do is cite the state statute.

Mr. Bennett: He introduced 21 pages.

The Court: That is not a state statute that he introduced.

Mr. Bennett: It is going to be part of the record. Are you denying us the right to introduce the state statute into the record?

The Court: The statutes are already in the record.

Mr. Warren: He is counsel just like I am counsel. The State of Arkansas is no bigger than the plaintiff in this case.

The Court: You could introduce all of the statutes in the State on any subject on that theory, couldn't you?

Mr. Bennett: Are you denying me the right to introduce the [146] state statute into the record?

The Court: No. I don't think the instrument you have here, picking out a statute on some other subject, is material to the issue here. You can put it in the record for the record.

(Thereupon, said copy of Act 168 of 1937 was marked for identification as Exhibit No. 5 and admitted for the record.)

Mr. Warren: I object to each one of them on the grounds that it encumbers the record.

The Court: I am letting them in the record, but ruling them immaterial to the issue before the Court.

Mr. Bennett: I want to introduce an authenticated copy

of Act 169 of 1931, which is our compulsory school attendance law and it also includes a provision that teaching is to be in the English language; that we shall teach good morals and manners and teach physical education, all mandatory state statutes.

The Court: Let it be admitted for the record.

(Thereupon, said Act was marked for identification [147] as Exhibit No. 6 and admitted for the record.)

Mr. Bennett: I would like to introduce as Exhibit No. 7 an authenticated copy of Act 147 of 1927, which is the statute that makes it mandatory to teach fire prevention in the grammar schools of the State of Arkansas.

The Court: Let that be admitted for the record.

(Thereupon, said Act was marked for identification as Exhibit No. 7 and admitted for the record.)

Mr. Bennett: I want to introduce an authenticated copy of Act 614 of 1923.

The Court: Mr. Warren, do you object to all of these?

Mr. Warren: Everyone of them, Your Honor.

The Court: The one on compulsory attendance, I think might be admissible under this situation.

Mr. Warren: Under the law of Arkansas, the Arkansas State Statutes are merely cited. They are not introduced. He could [148] just as well go get a volume of Arkansas Statutes and put the whole thing into the record to make it expensive on us to reproduce the record. That is the purpose of it.

The Court: Go ahead.

Mr. Bennett: I want to introduce a copy of Act 614 of 1923, which makes it mandatory that American History shall be taught in the schools of Arkansas.

The Court: Let it be admitted for the record.

Mr. Warren: Objection.

The Court: Note his objection.

(Thereupon, said Act 614 of 1923 was marked for identification as Exhibit No. 8 and admitted for the record.)

Mr. Bennett: I would like to introduce an authenticated copy of Act 355 of 1957, which makes it mandatory——

Mr. Warren: Objection.

The Court: Note his objection and let it be admitted for the record.

[149] (Thereupon, said Act 355 of 1957 was marked for identification as Exhibit No. 9 and admitted for the record.)

Mr. Bennett: And I would like to introduce an authenticated copy of Act 312 of 1939, which makes it mandatory that the conservation of natural resources shall be taught in the public schools of Arkansas.

The Court: Let that be admitted for the record.

(Thereupon, said Act 312 of 1939 was marked for identification as Exhibit No. 10 and admitted for the record.)

Mr. Bennett: The State would like to call Mr. Herschel Lee.

The Court: All right.

[150] HERSCHEL LEE,

a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Bennett:

Q. State your name.

A. Herschel Lee.

Q. Where do you live?

A. Swifton, Arkansas.

Q. What is your profession?

A. Superintendent of Schools, Swifton, Arkansas.

Q. How long have you been there, Mr. Lee?

A. Three years.

Q. Go ahead in your own words and outline your educational achievements.

A. I graduated from Star City High School in 1952 and have a B. S. Degree from Arkansas A. & M. College, and a major in English and a minor in Social Science, and a Master's Degree in School Administration from the University of Arkansas.

Q. As Superintendent of the Schools at Swifton, Arkansas, you are employed by an elected School Board up there?

A. Yes, sir.

[151] Q. And they in turn have employed a number of teachers which are under your administration?

A. Yes, sir.

Q. I think you have been in the Court Room and you know what this law suit is about and the sole question that will probably be determined is whether or not Initiated Act No. 1 of 1928 is reasonable legislation passed by the people of the State of Arkansas. Based upon your experience as School Superintendent and knowing the children under your administration and the teachers, do you think that Initiated Act No. 1 of 1928 is a reasonable statute to be administered by the school people?

Mr. Warren: I object, Your Honor. That is completely immaterial, irrelevant and improper.

The Court: I think that is a question for the Court, Mr. Bennett.

Mr. Bennett: Yes, sir, but the school people who are in day to day association with these things, Judge, they are professionals.

The Court: You can ask him as to whether certain facts or things are reasonable.

[152] Mr. Bennett: I am asking an expert whether or not

the statute is reasonable in conformance with school policy of the State of Arkansas.

Mr. Warren: If it becomes a question then, if this sort of question is proper, as to who has the finances to go out and get enough witnesses and parade them in infinitus, I will freely concede Mrs. Susan Epperson can't match that of the State of Arkansas.

Mr. Bennett: What has finances got to do with it?

Mr. Warren: You would parade witnesses for hours, use the financial availability of your office and bring one witness after another in here.

Mr. Bennett: Give me the list of the witnesses you want to call and the State of Arkansas will pay for them.

Mr. Warren: I am sure you would.

The Court: I don't think his opinion as to the reasonableness [153] of the Act is material here. That is the question that is before the Court and for the Court to decide.

Mr. Bennett: How is the Court going to decide unless he hears from experts?

The Court: Hear the facts about it, but not his conclusions as to the reasonableness of the Act. That is a matter to be determined by the Court.

Mr. Bennett: Eventually, yes, sir.

The Court: You are asking him for a generalized conclusion. You can ask him about some facts that might throw some light on whether or not it is unreasonable, but you are asking for a conclusion.

Mr. Bennett: Q. Do you think Initiated Act of—Initiated Act No. 1 of 1928 is an unreasonable statute?

Mr. Warren: To which I object.

The Court: Objection sustained.

[154] Mr. Bennett: You said I could ask him about the unreasonableness of the Act.

The Court: I said if you wanted to ask him about some factual matters that might indicate that it was unreasonable you can do that, but not for a generalized conclusion.

Mr. Bennett: As I understand it, you overrule my question?

The Court: If you want to ask him about a factual matter that tends to show that the Act is unreasonable you may do that, but not a generalized conclusion.

Mr. Bennett: I don't think it is unreasonable.

The Court: You have asked him the question, so I say that is a general conclusion. In that form, I don't think it is admissible.

Mr. Bennett: Q. You, as a school administrator, adhere to state law, don't you?

A. Yes, sir, I attempt to.

[155] Q. Your teachers sign a contract?

A. Yes, sir.

Q. And in that contract, it provides that the teachers shall also obey state law, is that right?

A. Yes, sir.

Q. Now, they are not teaching the Darwin theory in the schools of Swifton, are they?

A. No, sir.

Mr. Warren: I object to that and move that it be excluded. It doesn't make any difference what they teach in Swifton, as to whether or not that law is constitutional.

The Court: That's right. There is no dispute in this case about complying with state law. That is exactly the reason I understand this suit was brought, in an effort to determine what the state law is and it only said that both sides want to comply with the law.

Mr. Bennett: If the statute on the books has any adverse effect on the children in Swifton.

Mr. Warren: How could you tell whether or not teaching a snbject has had any adverse effects?

[156] Mr. Bennett: If it hasn't had any adverse effect it is a reasonable statute.

Mr. Warren: That is sort of like a man who is five feet nine and you ask him if his short height has had any effect and he says, "I have never been any taller."

The Court: I am trying to keep down argument until the testimony is over, if I can. He has answered your question it is not taught there. That is one of the factual things. Go ahead.

Mr. Bennett: Q. Have you had any parents or anybody up there requesting you to teach evolution?

A. No, sir.

Q. Who selects the text books to be taught at Swifton?

A. The same as hers, the board. I have a group of teachers to look through and pass on or recommend certain books and I pass this on to the board and the board, of course, according to state law, has the final say in what books are adopted.

Mr. Bennett: If the Court please, for the record, and I know that you are going to overrule the question, but I want to [157] ask the question and get the answer for the record.

The Court: I don't know whether I will or not. I will have to hear it first.

Mr. Bennett: Q. As a school official of this state, do you think Act No. 1 of 1928 is reasonable?

Mr. Warren: Your Honor, I want to object and I further want to object to him putting the answer in. We are opening the door. He is not interested in that answer.

The Court: I have already ruled.

Mr. Warren: He wants him to answer and we can go on here two or three days and maybe a week. He has a right to make a proffer.

The Court: I don't think it is admissible.

Mr. Bennett: For the record, will you let him answer the question?

Mr. Warren: The law of Arkansas is he can make a proffer. He can state if allowed to testify what he will say, the General [158] can. This is the attorney's privilege, or he can file a written statement.

The Court: It doesn't make any difference. It is a yes

or no answer. What do you say his testimony will be if permitted to answer?

Mr. Bennett: He will answer "yes".

Mr. Warren: All right.

The Court: That takes care of it.

Mr. Bennett: I told some other witnesses to be here at 1 o'clock.

The Court: It is about 12, so we will recess until 1 o'clock.

(Thereupon, at 12 Noon the hearing was recessed until 1 o'clock, p. m.)

[159] SUSAN EPPERSON,

recalled by the defendants, and under the same oath, testified further as follows:

Direct Examination,

By Mr. Bennett:

Q. Mrs. Epperson, have you ever read Initiated Act No. 1 of 1928?

A. Is this the law that we are talking about?

Q. Yes.

A. Yes, I have read it.

Q. And you said this morning, I believe, that you and a committee of teachers selected this book that has Chapter 39 in it?

A. Yes, sir.

Q. Were you aware then that you violated the law by being on a text book selection committee and selecting such a book?

Mr. Warren: She said she and a group of teachers voted on it and then the school board, the proper officials, adopted it.

The Court: I understood her to say the board adopted it.

Mr. Bennett: [160] Q. Were you asked to be on a committee to recommend the book?

A. We voted on several books.

The Court: I think you went over that this morning.

Mr. Bennett: Q. You were on a committee to select this book?

The Court: I see no need of repetition of the same thing you went over this morning.

Mr. Bennett: I am trying to show the Court she violated the law way before the law suit was brought, thereby breaching her contract with the Little Rock School Board.

The Court: You asked that this morning. Ask something new, She said she was on the committee and participated in it. You asked all of those questions this morning.

Mr. Bennett: Do you mind if she answers the question for the record?

The Court: I don't want you repeating the same thing for the record.

Mr. Bennett: I didn't ask her this morning if she was conscious [161] of the fact she violated the law when she helped select this book.

Mr. Warren: It must be a legal, constitutional law before you can violate it and I would rather she not answer the question.

The Court: Objection sustained.

Mr. Warren: She did not violate the law.

Mr. Bennett: Q. Have you had any parents, other than Mr. Blanchard, say this Act would have an adverse effect on their children?

Mr. Warren: I object to that.

The Court: I think that is all right, if she had any parents tell her that.

A. If I had any parents tell me that the law would have an adverse effect?

Mr. Bennett: Q. Adversely affected their children?

A. No, I have not.

Mr. Bennett: That is all.

Mr. Warren: [162] That's all.

Mr. Bennett: Just a minute.

Q. Have you had anybody in the community that doesn't have any children in school tell you that this Act on the books would have an adverse effect on the community?

Mr. Warren: Is this material?

The Court: I think she can answer it. Go ahead. I don't think it is material, but let her answer it.

A. No, sir.

Mr. Bennett: We are trying to determine if it is a reasonable statute.

The Court: Don't argue with the witness. She answered the question.

Mr. Bennett: Did she say "no"?

The Court: Yes.

Mr. Bennett: [163] Q. You have not had any school children say that the statute has had an adverse effect upon them, have you?

A. No, sir.

Mr. Bennett: That is all.

Mr. Warren: I have no questions.

(Witness excused.)

[164] HERSCHEL LEE,

recalled by the Defendants, and under the same oath, testified further as follows:

Direct Examination,

By Mr. Bennett:

Q. Mr. Lee, this morning I believe you said you had been in the public schools some 13 years?

A. No, sir, only 5 years.

Q. As Superintendent of the Schools at Swifton, have you had any of the children up there say the presence of

this Act on the statute books of Arkansas is having an adverse effect upon their education?

Mr. Warren: I object, Your Honor.

The Court: Objection noted. Let him answer.

A. No, sir.

Mr. Bennett: Q. Have any of the parents that have children in the public schools of Swifton stated on any occasion that the presence of this statute was having an adverse effect upon their children in the schools?

A. No, sir.

Q. Have you had any other individuals in the community or county communicate with you that the presence of that statute on the books is having an adverse effect upon the county or [165] community?

Mr. Warren: I object to all of that.

The Court: You are objecting to all of it and I am letting him answer it for the record.

A. No, sir, they have not.

Mr. Bennett: Q. As far as you are concerned, the statute is on the books and you have abided by it and nobody has objected?

A. That is true.

Mr. Bennett: I believe that is all.

Mr. Warren: I have no questions.

(Witness Excused.)

[166] JAMES O'DELL,

a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Bennett:

Q. State your name.

A. James O'Dell.

Q. Where do you live, Mr. O'Dell?

A. Thornton, Arkansas.

Q. Thornton, Arkansas?

A. Yes, sir.

Q. Calhoun County?

A. Yes, sir.

Q. What is your profession, sir?

A. Superintendent of the Schools at Thornton School District.

Q. How long have you been in the teaching profession?

A. 16 years.

Q. How long have you been Superintendent?

A. 8 years.

Q. You are aware that we have on the statute books of Arkansas Initiated Act No. 1, passed by the people in 1928, a statute which prohibits the teaching that mankind, human beings, ascended or descended from a lower form of animal? You know [167] about the statute?

A. Yes, sir.

Q. Have any of the school children——

The Court: Mr. Bennett, I might make this suggestion off the record.

(Off the record discussion.)

The Court: Will this witness testify the same as the previous witness on the questions about adverse effect?

Mr. Bennett: We are trying to show the statute is a reasonable statute. It won't take 5 minutes.

Mr. Warren: It won't take one minute for me to stipulate this witness will give substantially the same answers.

Mr. Bennett: Q. Do you know of any school children in your school district that have stated to you or any other teacher that the presence of this statute on the statute books have adversely affected them or their education?

A. No.

Mr. Warren: Objection.

[168] The Court: Your objections are noted.

Mr. Bennett: Q. Do you know of any adverse effect this statute has had on the schools of Thornton, Arkansas?

A. No.

Q. Has any parent or any other individual in your school district complained to you that this statute has had or is having an adverse effect upon the scientific education that they are receiving in the Thornton School District?

A. No.

Mr. Bennett: That is all.

Cross-Examination,

By Mr. Warren:

Q. Mr. O'Dell, is the Darwinian Theory of the evolution of man taught in Thornton?

A. Well, I was not aware that that particular theory was the evolution of man.

Q. Is the theory of the evolution of man taught in Thornton?

A. As a species, yes, sir.

Q. As a species?

[169] A. Yes.

Q. But the question Mr. Bennett asked you was whether or not this Act had had any adverse effect on the children, what the children had said, or complained to you that the lack of this particular knowledge had any effect on them. Do you know whether any of them have been taught in contravention of this statute?

A. Would you ask the question again, please?

Q. Yes. Do you know whether any of the children have been taught any subject in contravention, scientific subjects in contravention of this statute, any of the subjects forbidden to be taught by this statute?

A. No.

Q. You do not know, or they have not been taught?

A. I do not know.

Q. You do not know. You don't know whether they are even acquainted with the theories that are forbidden by this statute, do you?

A. I would hope that they are not, if they are forbidden by law.

Q. If they are not acquainted, how do they know whether they have been prejudiced or not?

A. Well, I would say that not anyone knows whether or not they are prejudiced by a thing they don't know exists. [169-a] That is a rather ridiculous question.

Q. It was a ridiculous answer.

Mr. Warren: That's all.

Mr. Bennett: I have nothing further.

(Witness excused.)

[170] A. R. McKENZIE,

a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Bennett:

Q. State your name.

A. A. R. McKenzie.

Q. Where do you live?

A. Sheridan, Grant County.

Q. Do you hold at present an elective position in Sheridan, Arkansas?

A. I am Mayor of the City.

Q. And I believe you were elected Mayor following your retirement as Superintendent of the Schools?

A. About two years after, yes, sir.

Q. Mr. McKenzie, how long have you been Superintendent of Schools in Sheridan?

A. I was Superintendent 28 years. I was in the schools 38 years.

Q. You taught school 38 years?

A. At Sheridan.

Q. And you were Superintendent of the Schools 28 years?

A. That's right.

Q. We have on the statute books of the State of Arkansas Act [171] No. 1 of 1928, adopted by a vote of the people by some 106,000 to 63,000. That statute forbids the teaching that man ascended or descended from the lower form of animals. Sometimes it is called the "Monkey" bill. Now, in the Schools of Sheridan, while you were there for 38 years, did you ever have any of the school children down there complain that the statute was having an adverse effect on their education?

A. Do you mean complain to me?

Q. Yes.

A. No, sir.

Mr. Warren: Objection.

The Court: Same objection.

Mr. Bennett: Q. I imagine you have graduated literally thousands of people from the Sheridan High School, haven't you, Mayor?

A. I expect so. About that.

Q. How many would you think altogether?

A. What did you say?

Q. How many children would you think you have graduated down there?

[172] A. It runs from 60 up to about 95 per year. For 28 years.

Q. You all teach science down there, biology?

A. Yes, sir.

Q. Do you know of any parents in that 38 years that have ever complained to you or any of your staff that this Act has had an adverse or an illadvised effect upon the public schools to the educational system of Sheridan, Arkansas?

A. Complained to me directly?

Q. Yes.

A. No, sir, not to me.

Q. Do you know of anybody in the community?

A. No, sir, I don't.

Q. That has stated it had an adverse effect?

A. No, sir.

Q. As a school official for 38 years, do you think it is a proper subject for the people of Arkansas to help regulate the curricula of the public schools?

Mr. Warren: I object to that. This is a matter of opinion, which is not material here.

Mr. Bennett: The man has been teaching school for 38 years. He ought to be able to form an opinion.

[173] Mr. Warren: He hasn't been practicing law and this is a legal question.

Mr. Bennett: What you don't want answered is always legal.

Mr. Warren: Unfortunately, it is.

Mr. Bennett: I want to know if as a school official for 38 years in his opinion, and I would think he could qualify as an expert school man, whether or not the enactment of this statute is a proper province of the people of the State of Arkansas.

The Court: That would not be a proper question. You can ask the witness about any facts or situations.

Mr. Bennett: He has already testified the statute hasn't had any adverse effect.

The Court: If you want to ask him any fact or circumstance that might throw light on whether or not the Act is reasonable you might do that.

[174] Mr. Bennett: Q. You at the Sheridan Schools have biology laboratories—or laboratory equipment to look at the grasshoppers and frogs under the microscope, don't you, Mayor?

A. Yes, sir.

Q. And you have a very modern public school system, I think?

A. Well, not as good as we wanted, but as good as we can do.

Q. And you all have missed the theory of evolution for 38 years?

A. Mentioned it or missed it?

Q. Missed it.

A. The fact about it is I couldn't see any difference before or after, because as far as I was concerned, I was an Agri teacher, was my training, and there is a lot of stuff in Agri that wasn't up to par and we left that out, and I think I had good teachers, and you know how you feel, or I wouldn't be wearing that pin there. (Indicating.) And I had good teachers that knew enough to leave out what ought to be left out.

Mr. Bennett: Thank you, Mayor.

Mr. Warren: I have no questions.

(Witness excused.)

[175] ED McMILLAN,

a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Bennett:

Q. State your name.

A. Ed McMillan.

Q. Where do you live?

A. Damascus, Arkansas.

Q. What is that County?

A. Faulkner.

Q. Where do you work?

A. Conway Printing Company.

Q. Do you hold an official, elective position in the Public Schools of Greenbriar, Arkansas?

A. Yes, sir.

Q. What is that position?

A. Chairman of the School Board.

Q. How long have you been Chairman of the Board?

A. This is my first year as Chairman. I have been on the Board 4 years.

Q. Mr. McMillan, we have a statute on the books of this state, adopted by the people in 1928, which simply says that the public schools shall not have in them the teaching that man [176] ascended or descended from a lower form of animals. As a School Board Director, and as Chairman, do you know of any adverse effect the presence of that statute has had upon the school children of Greenbriar?

Mr. Warren: I object, Your Honor.

A. No, sir.

Mr. Bennett: Q. Do you know of any adverse effect it has had on any parent? Has any parent complained to you because the theory of evolution is not taught in the schools of Greenbriar?

A. No, sir.

Q. Do you know of anybody else in the community who thinks that the absence of that statute has seriously affected the health and welfare and academic standards of the Schools of Greenbriar?

A. No, sir.

The Court: You are going a little too far. He can't testify what somebody else in the community thinks.

Mr. Bennett: Q. Has anybody complained to you as a member of the School Board?

[177] A. No, sir.

Mr. Bennett: That is all.

Mr. Warren: I have no questions.

(Witness excused.)

Mr. Bennett: I thought perhaps Mrs. Epperson's testimony would take a little longer this morning and we have a witness who will be here at 2 o'clock, Mr. Ode Maddox, who is a member of the General Assembly and also Super-

intendent of the Schools at Oden, Arkansas and the record will show that his testimony would be substantially the same as Mr. Herschel Lee's and Mr. McKenzie's and Mr. McMillan's and Mr. James Odell's.

Mr. Warren: I will stipulate.

Mr. Bennett: Also, Mr. Roy Bolin, Superintendent of the Schools at Junction City, Arkansas, whose testimony will be substantially the same.

Mr. Warren: If the gentleman states that, I so stipulate.

[178] HUBERT BLANCHARD,

recalled by the defendants, under the same oath, testified as follows:

Direct Examination,

By Mr. Bennett:

Q. Mr. Blanchard, I believe you said this morning that you were actively in the teaching profession for how many years?

A. 13 years.

Q. As teacher and as superintendent and as principal?

A. That's right.

Q. During those years, did you ever have any parent of any school children in your schools come to you and say the presence of Act No. 1 of 1928 was having an adverse effect upon the school system?

A. I can't say that I have.

Q. Did you have anybody in the community come to you and state it was having an adverse effect?

A. I don't believe so.

Q. Nobody has ever expressed to you the idea that this statute, is unreasonable, on the part of people, have they?

A. Oh, yes, sir.

Mr. Warren: I object. Public interpretation has nothing to do with it.

[179] The Court: He answered your question by saying nobody objected.

Mr. Bennett: That is all.

Mr. Warren: I have nothing further.

(Witness excused.)

[59] **MEMORANDUM OPINION.**

(Formal parts omitted.)

This is an action instituted by the plaintiff, as a citizen and resident of Little Rock, Pulaski County, Arkansas, and as a teacher at Little Rock Central High School, employed by the Directors of the Little Rock School District, seeking a declaratory judgment and injunctive relief. Intervenor, Hubert H. Blanchard, Jr., intervened in the action, seeking a declaratory judgment under the terms of the Arkansas Declaratory Judgment Act (Ark. Stats. 34-2501 through 34-2512).

Both the plaintiff and the intervenor allege that Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) is unconstitutional and void because the Act contravenes certain provisions of the Constitution of the United States and the Constitution of the State of Arkansas.

[60] Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) reads as follows:

> "80-1627. Doctrine of Ascent or Descent of Man From Lower Order of Animals Prohibited.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use

in any such institution a textbook that teaches the doctrine or theory that mankind deseended or ascended from a lower order of animals."

"80-1628. Teaching Doctrine or Adopting Textbook Mentioning Doctrine—Penalties—Positions to Be Vacated.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (S. S. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in section 1 (S80-1627) hereof, or by using, or adopting any such textbooks in any such [61] educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

Section 4 of Article 14 of the Constitution of the State of Arkansas reads as follows:

"S4. Supervision of Schools.—The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The First Amendment to the Constitution of the United States reads as follows:

"(Religious and Political Freedom.)—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

"S1. (Citizenship—Due Process of Law—Equal Protection.)—All persons born or naturalized in [62] the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Let it be understood at the outset that this Court is not unmindful of the public interest in this case, or of the vital concern of many people in what theories may be taught in the schools, colleges and universities of this state.

The engrossing questions relating to the origin of man, the destiny of man, and the creation of the universe have engaged the thoughts and demanded the attention of the world's greatest philosophers, scientists, theologians, and educators. These questions cannot be answered by the enactment of laws or by the decisions of courts.

In view of the fact that many people have apparently misinterpreted the decisions of the United States Supreme Court regarding the teaching of the Bible in the public schools of our Nation, an explanatory statement seems appropriate. [63] Statements are frequently heard such as "the Bible has been banned from the schools" and "the Bible cannot be taught in the schools". Such statements are not consistent with the language in the decisions of the Supreme Court. In the recent case of **Abington School District v. Schempp**, 374 U. S. 203, 10 L. ed. 2nd 844, Mr. Justice Clark, speaking for the Court, made the following statement:

"In addition, it might well be said that one's education is not complete without a study of comparative

religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such a study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."

Judge Clark's opinion speaks for the majority and its language refutes any contention that the Bible or religion may not be taught in the schools nor studied in the schools.

In a concurring opinion in the same case, Judge Brennan said:

"The holding of the Court today plainly does not foreclose the teaching about the Holy Scriptures or about [64] the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not."

This Court does not interpret the decisions of the United States Supreme Court as prohibiting the teaching of the Bible in the public schools. It is not the teaching of the Bible account of the creation of man contained in the Book of Genesis that is prohibited in the public schools, but it is the conduct of "a religious observation", or "a religious exercise" which the Supreme Court has said the Constitution prohibits. The Supreme Court has

ruled that school boards and officials cannot prescribe and require an official prayer, but this is far from ruling the Bible out of the public schools, statements to the contrary notwithstanding.

Religious practices may be tested or challenged in courts, but religious beliefs or experiences are beyond the competency of courts to prove or disprove. The truth or the [65] fallacy of a scientific theory or doctrine (like a religious doctrine or belief) is not a triable issue in court.

The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether "the theory or doctrine that mankind ascended or descended from a lower order of animals" is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them.

Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. "Teachers and students must always remain free to inquire, to study and to evaluate." **Shelton v. Tucker**, 364 U. S. 479, 5 L. ed. 2nd 231.

The field of science necessarily involves the discussion and evaluation of **speculative theories.** This has been recognized by the Supreme Court of the United States in the following language:

> "For society's good—if understanding be an essential need of society—inquiries into these problems, [66] speculations about them, stimulation in others of re-

flection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling." Sweezy v. New Hampshire, 354 U. S. 234, 1 L. ed. 2nd 1311.

In view of the testimony of the plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory that mankind ascended or descended from a lower order of animals, set out in the textbook adopted by the Little Rock School Administration, this Court can find no "exigent and obviously compelling" reason to prohibit a teacher from presenting and explaining the theory along with other theories or doctrines which a student may accept or reject, even though the theory may be objectionable to many of our citizens. By use of the word "teach" the court accepts the common definition "to make aware of by information or to impart the knowledge of". That this is the meaning of the word "teach" intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt "a textbook that teaches the doctrine or theory."

This Court has carefully considered the holding in the **Scopes** case. **Scopes v. State of Tennessee**, 154 Tenn. 105, [67] 289 S. W. 363. It seems that the decision in that case was based principally upon the theory that "In dealing with its own employees engaged upon its own work, the State is not hampered by the limitation . . . of the Fourteenth Amendment to the Constitution of the United States." Counsel for plaintiff and intervenor contend that the Scopes case has been completely overruled while the Attorney General argues that the decision in that case has only been modified. Even if the decision has not been completely overruled by later decisions of

the United States Supreme Court, it is the opinion of this Court that the holding in the Scopes case has been modified and made obsolete to such an extent that it does not apply to the case at bar and that it should not be followed. **Gitlow v. New York,** 268 U. S. 652, 69 L. ed. 1138. **Torcaso v. Watkins,** 367 U. S. 488, 6 L. ed. 2nd 982. **Beilan v. Board of Education,** 357 U. S. 399, 2 L. ed. 2nd 1414.

The Fourteenth Amendment to the United States Constitution encompasses the first ten amendments to the Constitution and the guarantees therein contained. A state may not extinguish the freedoms guaranteed by the Constitution arbitrarily or unreasonably even in the exercise of the police power. Whether a statute is wise or unwise is not for the courts to say, but whether it is reasonable or unreasonable is for the courts to determine. The decision of the United States Supreme Court [68] in the case of **Bartels v. Iowa,** 262 U. S. 403, 67 L. ed. 1047, appears to be in point. In that case the state had enacted a statute forbidding the teaching of foreign languages in the public schools. This statute followed the first World War and it was presumed that the German language was not popular with a majority of the citizens of the state. Nevertheless, the United States Supreme Court held that such an act was arbitrary and unreasonable.

This Court is of the opinion that Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be sup-

pressed by the state. If it should be held that the teaching of such a theory does constitute such a hazard, then the statute in question obviously fails to protect the student in a private school from the hazard and thus denies the equal protection of the law.

Many people do not agree with the decisions of the United States Supreme Court. Others will agree with them. But it is the duty and responsibility of trial courts to follow the [69] decisions of the Supreme Court even when we may not agree with them, if we are going to maintain our constitutional principles. This Court is not unmindful of the general rule that statutes should not be held unconstitutional where constitutionality is subject to doubt. In the Court's opinion the unconstitutionality of the statute under consideration is not subject to doubt, irrespective of the motives of those who secured its passage.

Therefore, it is the opinion and ruling of this Court that a decree be entered declaring Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) unconstitutional and void, and that the defendants have no authority to proceed under the act or to enforce the provisions thereof.

No testimony was offered or showing made in this action that the defendants, as Directors and Superintendent of the Little Rock School District, have threatened or have indicated any intention to dismiss plaintiff from her teaching position, or to cancel her contract to teach in the public schools of Little Rock. Counsel for the Directors of the Little Rock School District and the Superintendent of Schools, who are defendants in this case, announced in open court that the School Board and the school officials would follow the decree of this Court. In view of that statement the Court deems it [70] unnecessary to issue an injunction at this time in aid of the declaratory judgment. However, if an effort is made

in future to enforce the statute an injunction would be appropriate.

Counsel for plaintiff and intervenor will prepare a precedent for decree consistent with this opinion and submit the precedent to opposing counsel for approval as to form and then to this Court for consideration and signature.

/s/ MURRAY O. REED,
MURRAY O. REED, Chancellor.

Date 5-27-66.

[71] **DECREE.**

(Formal parts omitted.)

This cause is this day submitted to the Court for its consideration and decree. The plaintiff and intervenor were represented by their attorney, Eugene R. Warren, Esq., the defendants by their attorney, Herschel H. Friday, Jr., Esq. and the State of Arkansas by its attorneys Honorable Bruce Bennett, Attorney General and Honorable Fletcher Jackson, Assistant Attorney General. The cause was submitted to the Court upon the complaint of the plaintiff, the intervention of the intervenor, the answer of the defendant and the answer of the State of Arkansas and upon testimony of witnesses for both the plaintiff and the intervenor and the State of Arkansas and documentary evidence, from all of which the Court finds:

[72] 1. Initiated Act No. 1 of 1928 (Ark. Stat. 80-1627 and 80-1628) is unconstitutional and void.

2. It is unnecessary that an injunction be issued at this time in aid of this declaratory judgment. The Court should, however, retain jurisdiction of the cause to issue an injunction if any effort is made in the future to enforce said unconstitutional and void statute.

It Is Therefore, Considered, Ordered, Adjudged, and Decreed that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void. The Court retains jurisdiction of this cause to issue such orders as may be necessary in aid of this declaratory judgment. The memorandum opinion heretofore issued by the Court is made a part of this decree. Each party, hereto, shall bear his respective cost herein expended.

/s/ MURRAY O. REED,
Judge.

Date: 6-16-66.

Approved: Eugene R. Warren, for Plaintiff.

Approved: Fletcher Jackson, for State.

Approved: Herschel H. Friday for Defendants.

[73] **NOTICE OF APPEAL AND DESIGNATION OF RECORD.**

(Formal parts omitted.)

Comes the State of Arkansas by the Attorney General of Arkansas, and hereby gives notice of its appeal to the Supreme Court of Arkansas from the decree entered herein on June 16, 1966; and designates for inclusion in the record on appeal the entire record herein.

BRUCE BENNETT,
Attorney General,
/s/ FLETCHER JACKSON,
By: FLETCHER JACKSON,
Assistant Attorney General.

[182] SUPREME COURT OF ARKANSAS.

No. 5-4127.

Opinion Delivered June 5, 1967.

STATE OF ARKANSAS, Appellant, v. SUSAN EPPERSON and H. H. BLANCHARD, Appellees. | Appeal from Pulaski Chancery Court, First Division. | Reversed and Dismissed.

PER CURIAM.

Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann., § 80-1627 and § 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

The decree is reversed and the cause dismissed.

Ward, J., concurs. Brown, J., dissents.

[183] **CONCURRENCE.**

Opinion Delivered 6-5-67.

I agree with the first sentence in the majority opinion.

To my mind, the rest of the opinion beclouds the clear announcement made in the first sentence.

PAUL WARD,
Associate Justice.

[184] **JUDGMENT.**

(Caption omitted.)

This cause came on to be heard upon the transcript of the record of the Chancery court of Pulaski County, First Div., and was argued by counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and decree of said Chancery Court in this cause as set out in the opinion herein delivered.

It is therefore ordered and decreed by the Court that the decree of said Chancery court in this cause rendered be, and the same is hereby reversed and the cause dismissed.

It is further considered that said Appellant recover of said appellee all his costs in this Court, in this cause expended, and have execution thereof.

Ward, J., concurs.

Brown, J., dissents.

[185] **APPELLEES' PETITION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF.**

(Formal parts omitted.)

[186] **Petition for Re-Hearing.**

Come the appellees and pray that this Court grant a re-hearing in this case, respectfully submitting that the Court erred in the following particulars:

1. The Court erred in failing and refusing to declare Initiated Measure No. 1 of 1928, Arkansas Statutes, Sec. 80-1627 and 80-1628 unconstitutional and void as being in direct conflict with the protections granted the appellees under the specific language of the First Amendment to the Constitution of the United States.

2. The Court erred in failing and refusing to declare that the Initiated Act No. 1 of 1928 was void because it conflicts with the equal protection of the laws clause contained in Amendment 14 to the Constitution of the United States.

3. The Court erred in failing and refusing to declare that Initiated Act No. 1 was unconstitutional and void in that it is so vague and indefinite as to conflict with the [187] due process clause of Amendment 14 to the Constitution of the United States.

4. The Court erred in failing and refusing to declare that Initiated Act No. 1 was unconstitutional and void in that it was arbitrary and capricious and in conflict with the due process clause of the Constitution of the United States.

5. The Court erred in failing and refusing to declare Initiated Act No. 1 unconstitutional and void in that it conflicted with the provisions of Amendment 1 of the Constitution of the United States guaranteeing the freedom of religion.

Wherefore, Appellees pray that this Honorable Court grant a rehearing herein and affirm the judgment of the lower Court heretofore entered.

[188] **Brief in Support of Petition for Re-Hearing.**

The Court has stated in its *Per Curiam* order that Initiated Act No. 1 is a valid exercise of the State's power to specify the curriculum in its public schools. We do not challenge the right of the State to establish the curriculum to be taught in the public schools. The establishment of a curriculum for what must be taught is entirely separate and distinct from an arbitrary prohibition against the teaching of a commonly taught theory in the field of

science. It is not by the specification of a curriculum in which we assert the State has acted unconstitutionally, but the arbitrary prohibition seeking to restrict the manner of teaching of one of the science subjects. This presently discussed Act does not attempt to specify a curriculum. It does not say what shall be taught; it says what can not be taught. In **Meyer v. Nebraska**, 262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. Rep. 625, at issue was the constitutionality of a statute of the State of Nebraska which prohibited the teaching of "any subject to any person . . . in any language other than the English language." The statute was attacked as violative of the Constitution of the United States, particularly the 14th Amendment. In holding the statute unconstitutional the United States Supreme Court said:

> "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement [189] that they shall be given instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those are matters not within the present controversy. Our concern is with the prohibition approved by the Supreme Court."

Certainly a State may provide that nothing can be taught in the public schools which is "manifestly inimical to the public welfare". **Pierce v. Society of Sisters of Holy Names**, 268 U. S. 510, 69 L. Ed. 1071. This Court has not said that knowledge of the theory of evolution is "manifestly inimical to the public welfare", and it should not permit its *Per Curiam* order to be so interpreted. In all fairness to teachers and students it should answer the principal question herein involved, viz: "Is knowledge that there is a theory of evolution so potentially harmful to a student that imparting such knowledge in the class-

room may be prohibited under pain of criminal conviction."

The Court has evidently not considered this case from the standpoint of the student. Both parents and the students' rights are effectively involved in this case through the intervention of H. H. Blanchard on behalf of himself and his children and all others similarly situated. The freedom of speech guaranty in the First Amendment to the Constitution of the United States is also a guaranty of the freedom to learn. The Blanchard children have a constitutionally guaranteed right to access to all available scientific knowledge, be it theory or fact, and this right [190] to learn is not subject to the whim of the majority by the exercise of their vote. Misguided ignorance may not constitutionally suppress the quest for knowledge even though suppression is accomplished through the power of the poll. "The First Amendment gives freedom of mind the same security as freedom of conscience." **Thomas v. Collins**, 323 U. S. 516, 89 L. Ed. 430.

At the trial of this case the suggestion was advanced by the Attorney General that the Blanchard children could go somewhere else and learn this theory. It does not meet constitutional requirements to say to one held in intellectual slavery: "Go somewhere else and you can be free." The freedom to learn, secured by the constitution, means freedom in one's native State, not access to freedom in a more enlightened political climate.

In the **Meyer** case, *supra*, Mr. Justice McReynolds stated:

> "Evidently the' legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

The presently discussed Act interferes with the calling of biology teachers. It clearly discriminates against biology teachers in public schools as distinguished from biology teachers in private schools. It deprives Mrs. Epperson and other science teachers of the right to carry out her duties in a proper manner; in short, it unduly restrains her calling.

[191] We shall not attempt to restate our original argument that Act No. 1 is so vague and indefinite as to conflict with the "due process" clause of the 14th Amendment to the Constitution of the United States. Evidently this Court found that the Act was not definite in application since the second sentence of the Court's *per curiam* order stated that the Court expressed no opinion on the question whether the Act prohibited teaching that the theory is true. Traditional concepts of teaching are thus made inharmonious, if not divorced. In so stating its own position of indecision, the Court has tremendously complicated the problem as respects the school teacher. Is there a difference between "explaining" a theory in a classroom and "teaching" a theory? Eminent educators to whom we have turned in our effort to understand this second sentence tell us there is no way to determine when a teacher in a classroom stops "teaching" and starts "explaining", or when a teacher stops "explaining" and starts "teaching". Indeed, classroom discussion and explanation by the teacher is one of the essential elements of teaching. It is respectfully urged that this Court clarify its second sentence or eliminate it entirely from the decision.

In the Meyer case, *supra*, the Court held that the Nebraska statute prohibiting the teaching of a foreign language was arbitrary and therefore unconstitutional under [192] the provisions of the 14th Amendment to the Constitution of the United States. The Court said:

> "Mere knowledge of the German language cannot reasonably be regarded as being harmful."

Specifically, the holding of the Court in **Meyer** is stated:

> "We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the State."

The brevity of this Honorable Court's opinion has deprived us of any clue as to findings by the Court. Surely this Court does not mean to hold that mere knowledge of the existence of a theory of evolution can reasonably be regarded as harmful. This Honorable Court's opinion can rest upon only one of two conclusions: either this Court must have held that the State's power over the public schools is immune from constitutional requirements and guarantees, or that mere knowledge of the existence of the theory of evolution can reasonably be regarded as harmful and is inimical to the public welfare. As to the first premise, **Meyer v. Nebraska**, *supra*, and subsequent decisions of the United States Supreme Court demonstrate conclusively that such a premise is absolutely erroneous. As to the second premise, this Court, if it so concluded, owes a duty to the teaching profession to so announce.

In **Meyer**, *supra*, the opinion stated that the liberty secured and guaranteed to the individual by the due process clause of the 14th Amendment included the right "to acquire [193] useful knowledge" The Court further stated that the established doctrine of the United States Supreme Court is that this liberty may not be interfered with under the guise of protecting the public interest by arbitrary legislation. The Court further stated with reference to that plaintiff, a school teacher, that "his right to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment".

It is respectfully submitted that this Court should enter its order granting rehearing in this cause, and that upon said rehearing the decree of the Chancery Court should be affirmed.

Respectfully submitted,

WARREN and BULLION,
Tower Building,
Little Rock, Arkansas,

By: .....
EUGENE R. WARREN,
Attorneys for Appellees.

[194] **ORDER DENYING PETITION FOR REHEARING.**

(Caption omitted.)

Petition for rehearing is denied.

[184-A] **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.**

(Formal parts omitted.)

I. Notice is hereby given that Susan Epperson and H. H. Blanchard, the plaintiff and intervenor in the lower court (Pulaski County Chancery Court, First Division), and appellees in the Supreme Court of Arkansas, hereby appeal to the Supreme Court of the United States from the Order of the Supreme Court of Arkansas, dated the 5th day of June, 1967, reversing and dismissing the complaint and intervention of said parties, and the final Order of the Supreme Court of Arkansas, dated the 26th day of July, 1967, denying to plaintiff and intervenor their petition to rehear the said judgment, aforesaid.

This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The entire transcript of the record of the lower court proceedings, including all pleadings, motions, orders, written opinions, notices, designations, oral testimony of witnesses, exhibits, and decree, and including all motions, orders, judgments, opinions, and proceedings of record in the Supreme Court of Arkansas, it being the intention hereof to include all matters, proceedings, orders, evidence in this cause from the date of its inception in the lower court up to and including the order of the Supreme Court of Arkansas denying and refusing the Petition of appellants for Rehearing, and including this Notice [184-B] and all other appeal documents to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Do the Arkansas anti-evolution laws (Ark. Stats. Secs. 80-1627 and 80-1628) violate the First Amendment to the Constitution of the United States by denying to appellants the rights of freedom of speech, of thought and expression, and the right to teach and the freedom to learn.

2. Do the Arkansas anti-evolution laws, supra, violate the Fourteenth Amendment to the Constitution of the United States, if they are construed to fall into the category of permissible police legislation which would warrant the extinguishment of the freedom of speech and the freedom to learn, in that they

deny to appellants the equal protection of the laws by its limited applicability to "tax supported" schools.

3. Do the Arkansas anti-evolution laws, supra, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States by defining as a crime, in vague and indefinite terms, "to teach the theory".

4. Do the Arkansas anti-evolution laws, supra, violate Amendment One to the Constitution of the United States by denying to appellants their guaranteed freedom of religion.

/s/ EUGENE R. WARREN,
EUGENE R. WARREN,
Attorney for Susan Epperson and
H. H. Blanchard, Appellants.

SUPREME COURT, U. S.

OCT 20 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court Of The United States

October Term, 1968

No. [redacted] 7

In The Matter Of The Application

— Of —

Susan Epperson and H. H. Blanchard

JURISDICTIONAL STATEMENT

EUGENE R. WARREN

BRUCE T. BULLION

WARREN & BULLION, ESQS.

1450 Tower Building

Little Rock, Arkansas

Attorneys for Appellants

TREVATHAN PRINTING COMPANY, BATESVILLE, ARKANSAS

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IN THE

Supreme Court Of The United States

October Term, 1967

No. _____

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants*

— v. —

STATE OF ARKANSAS, ... *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the Supreme Court of Arkansas of July 26, 1967, denying their petition to grant rehearing of the judgment of the Supreme Court of Arkansas, entered on June 5, 1967, reversing the decision of the Chancery Court of Pulaski County, Arkansas, entered on June 16, 1966, which had declared, on petition and intervention of appellants, that Initiated Act No. 1 of 1928 (Acts of Arkansas, 1929, Vol. II, p: 1518, et seq; Ark. Stats. Ann. Secs. 80-1627 and . 80-1628), was unconstitutional and void. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented.

CITATION TO OPINION BELOW

The decree entered by the Chancery Court of Pulaski County, Arkansas on June 16, 1966, was accompanied by a written opinion (R. 59). That opinion, which is not officially reported, is set out in the Appendix, *infra*, p. 21. The opinion (*per curiam* order) of the Supreme Court of Arkansas is not yet officially reported (R. 182) and is set out in Appendix, *infra*, p. 19.

JURISDICTION

Appellants sought a declaratory judgment out of the Chancery Court of Pulaski County, Arkansas, pursuant to Ark. Stats. Ann., Secs. 34-2501 through 34-2512, that Initiated Act No. 1 of 1928, is unconstitutional and void, asserting in their petition for this purpose that said Act violated their respective constitutional rights guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States (R. 2). The Chancery Court of Pulaski County, Arkansas, issued its written opinion on May 27, 1966, and decree on June 16, 1966, holding that said Act did violate those constitutional guaranties of appellants (R. 59).

The State of Arkansas filed its Notice of Appeal to the Supreme Court of Arkansas on June 21, 1966, the Little Rock School Directors (parties defendant in the lower Court) not joining in the appeal (R. 73). On June 5, 1967, the Supreme Court of Arkansas reversed the decree of the lower Court and held that Initiated Act No. 1 of 1928 did not violate the constitutional rights of appellants, and dismissed their petitions (R. 182). Appellants promptly and timely filed with the Supreme Court of Arkansas petition for rehearing, as required by Arkansas procedure, and

on July 26, 1967, the Supreme Court of Arkansas refused to grant to appellants the requested rehearing, and thereby the decision of the Supreme Court of Arkansas became final on that date (R. 194).

The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Arkansas on September 25, 1967 (R. 184-A).

Jurisdiction of this Court on appeal rests upon 28 U. S. C. Sec. 1257(2). *Williams v. Bruffy*, 96 U. S. 176 (1877); *Largent v. Texas*, 318 U. S. 418 (1943); *Griswold v. Connecticut*, 381 U. S. 479, (1965).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Petitioner Epperson, a science (biology) teacher at Little Rock Central High School in the Little Rock School District, and petitioner Blanchard, a parent of school-age children in the public schools of Arkansas, sought to have declared unconstitutional and void Ark. Stats. Ann., Secs. 80-1627 and 80-1628, which provides:

> *SECTION* 80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select

textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

SECTION 80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE. — PENALTIES. — POSITIONS TO BE VACATED. — Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

2. Petitioners alleged in the lower Court action that the above quoted Arkansas statute violated the First Amendment and the first Section of the Fourteenth Amendment to the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Do the Arkansas anti-evolution laws (Ark. Stats. 80-1627 and 80-1628) violate the First Amendment to the Constitution of the United States by denying to appellants the rights of freedom of speech, of thought and expression, and the right to teach and the freedom to learn?

2. Do the Arkansas anti-evolution laws violate the Fourteenth Amendment to the Constitution of the United States if they are construed to fall into the category of permissible police legislation which would warrant the extinguishment of the freedom of speech and the freedom to learn, in that they deny to appellants the equal protection of the laws by limited applicability to "tax-supported" schools?

3. Do the Arkansas anti-evolution laws violate the due process clause of the Fourteenth Amendment to the Constitution of the United States by defining as a crime, in vague and indefinite terms, "to teach the theory"?

4. Do the Arkansas anti-evolution laws violate Amendment One to the Constitution of the United States by denying to appellants their guaranteed freedom of religion?

STATEMENT OF THE CASE

In the year 1928 the people of Arkansas adopted the questioned statute which provides, in brief, that it is unlawful, with criminal penalties attached, to teach the theory or doctrine, in any tax-supported school, that mankind ascended or descended from a lower order of animals, or, to select, adopt or use, in Arkansas tax-supported schools, a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Appellant Susan Epperson, a science teacher in Little Rock Central High School, employed by the Little Rock Public School District to teach the subject of biology during the school year beginning in 1965, was furnished the prescribed textbook adopted for use in the biology course

for the school year, which textbook contained chapters on the theories of the evolution of man (R. 78). Faced with the problem of either failing to teach her subject properly, or, violating a criminal law of the State of Arkansas, she filed this action in the Chancery Court of Pulaski County, Arkansas, seeking a declaratory judgment that Ark. Stats. Ann. Secs. 80-1627 and 80-1628 (called "anti-evolution law"), was a void enactment in that it violated her rights of free speech guaranteed to her by the First and Fourteenth Amendments to the Constitution of the United States. She alleged it was her duty as a teacher to discuss with and explain to the students all scientific theories, including the Darwinian concept of evolution that man ascended from a lower form of animal life, and that she intended to acquaint her students with the facts of this theory, but did not intend to ask or require them to accept it as true. In addition, she asserted that if the Darwinian heory of evolution was interpreted to be a religious theory (which she denied), that legislation such as the questioned Act would violate the same constitutional guaranties, supra (R. 6).

Appellant Blanchard, a parent of two minor children enrolled in the Arkansas public schools, intervened in this action, by permission of the lower Court (R. 14, 15), and in addition to adopting the allegations of the complaint, alleged, for the same constitutional reasons, that to deny his sons, and him, of the right to be taught, and to teach them, and to learn, and the academic freedom of exposure to all scientific theory, denied to him and his children their guaranteed right of freedom of speech (R. 17).

The lower Court, after hearing the evidence, and considering the arguments of counsel, issued a written opinion finding that the questioned statute did violate the constitu-

tional guaranties of freedom of speech of plaintiff and intervenor (R. 59).

The Sate of Arkansas, by its Attorney General, appealed this decision to the Supreme Court of Arkansas on June 21, 1966, but the Little Rock School Directors and the Superintendent of the Little Rock Public Schools, the named defendants in this action, did not join in this appeal. On June 5, 1967, the Supreme Court of Arkansas, in a *per curiam* order joined in by six or seven members of the Court (one of the six concurring as to the constitutional question but dissenting as to the second sentence of the order), reversed the lower Court decree and held that the Arkansas "anti-evolution act" is a valid exercise of the state's power to specify the curriculum in its public schools. Appellants filed in the Supreme Court of Arkansas, on June 20, 1967, timely petition for rehearing, as required, which petition the Supreme Court of Arkansas denied on July 26, 1967, and thereby the decision of the Supreme Court of Arkansas that the Arkansas anti-evolution law is valid became a final determination and appellants have no further recourse to Arkansas courts for relief.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

Appellant Epperson raised the federal questions in her complaint as follows:

> "Plaintiff asserts and alleges that Arkansas Statutes 80-1627 & 80-1628, the so-called "Monkey Bill" is void and of no effect being unconstitutional and void as conflicting with plaintiff's constitutional right of freedom of speech as guaranteed by the First and Four-

teenth Amendments to the Constitution of the United States . . . (R. 5, 6).

"Plaintiff states that the sponsors of said statutes seek to justify its adoption and enforcement on the grounds that the Darwinian theory is a religious theory contrary to Christianity. Such assertion is contrary to the facts and erroneous, but as interpreted by said sponsors constitutes action by the State to enter the field of religions which is specifically prohibited by Amendments One and Fourteen of the Constitution of the United States . . ." (R. 6).

Appellant Blanchard, in addition to adopting the above allegations contained in the complaint of appellant Epperson, also alleged:

"Intervenor asserts that to deny his sons the right to be informed of all scientific theories and hypotheses is to deny them access to a complete education so highly desirable for the development of mental capacity and ability; that the guaranties of the 14th Amendment to the Constitution of the United States secure to every citizen of the United States the right to access to all sources of knowledge and learning including the right to be informed of scientific theories or hypotheses irrespective of whether the scientific theories or hypotheses are accepted or believed by a majority or minority of the other citizens of the United States. The "intervenor asserts that the guaranty of freedom of speech provided by both the Constitution of the United States . . . includes the guaranty of the freedom to learn. A complete and satisfactory education requires that scholars be informed of what may not be believable as well as what may be believable,

and academic freedom to learn demands that the scholar, and not a political majority, shall have the right to select what, to him, is believable and what is not believable. The Constitution of . . . the United States secures to every scholar the constitutional right to be infromed of all scientific theories and hypotheses and the constitutional right, unrestricted by belief of the majority, to accept that which he and he alone considers credible and worthy of belief.

"Intervenor asserts and alleges that Ark. Stats. 80-1627 and 80-1628 deny to intervenor's sons the right to be taught and to learn, and in doing so contravenes the guaranties of freedom of speech and freedom to learn secured by the Constitution of the United States . . . Intervenor asserts that said statutes are void and of no effect and that this Court should enter its decree declaring said statutes unconstitutional and void." (R. 16).

The written opinion of the trial court dealt specifically with each of the constitutional questions raised in the complaint and intervention. The trial Court said:

"The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether 'the theory or doctrine that mankind ascended or descended from a lower order of animals' is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional

right of teachers and scientists to advance theories and to discuss them.

"Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. 'Teachers and students must always remain free to inquire, to study and to evaluate.' *Shelton v. Tucker,* 364 U. S. 479 (1960).

"By use of the word 'teach' the court accepts the common definition 'to make aware of by information or to impart the knowledge of'. That this is the meaning of the word 'teach' intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt 'a textbook that *teaches* the doctrine or theory'.

"This Court is of the opinion that Act No. 1 of 1928 tends to hinder the quest for knowledge, restrict the freedom to "learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be suppressed by the state.

"Therefore, it is the opinion and ruling of this Court that a decree be entered declaring initiated Act No. 1 of 1928 unconstitutional and void, and that the defendants have no authority to proceed under the act or to enforce the provisions thereof." (R. 59).

In accordance with the written opinion of the lower

Court, on May 27, 1966, it entered the following decree on June 16, 1966:

> "It is, therefore, considered, ordered, adjudged and decreed that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void . . . The memorandum opinion heretofore issued by the Court is made a part of this decree (R. 71)."

On appeal to the Supreme Court of Arkansas, appellees Epperson and Blanchard presented, by brief and argument, the following additional questions for the consideration of that Court (in addition to arguing the constitutional questions considered by the lower Court):

> "The statute is void under the equal protection of the law clause of the 14th Amendment to the Constitution of the United States because of its limited application to tax supported schools, only.
>
> "The statute conflicts with the due process clause of Amendment 14 to the Constitution of the United States in that it is vague and indefinite by defining as a crime 'to teach the theory' ".

These constitutional questions were thoroughly briefed and argued by the parties in the Supreme Court of Arkansas, the State arguing that the statute did not deny to appellants (appellees there) any right guaranteed by the Constitution of the United States, much less freedom of speech and religion, the due process of the law, or the equal protection of the law. In the State's brief to the Supreme Court of Arkansas the Point To Be Relied Upon was stated to be: "The Arkansas statutes prescribing the teaching of evolution are constitutional, being a reasonable regulation of the conduct of a public employee, a school

teacher, and a reasonable regulation of the curriculum in the public schools".

In reversing the lower Court declaration of unconstitutionality the Supreme Court of Arkansas considered the constitutionality of the anti-evolution statute and stated (quoting its entire "opinion"):

> "Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. Sec. 80-1627 and 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.
>
> "The decree is reversed and the cause dismissed.
>
> "Ward, J., concurs. Brown, J., dissents."

Within the time prescribed by Arkansas law, on June 20, 1967, appellants filed Petition For Rehearing with the Supreme Court of Arkansas, with accompanying brief, arguing that the Supreme Court of Arkansas erred in the following particulars:

> "In failing and refusing to declare Initiated Measure No. 1 of 1928, unconstitutional and void as being in direct conflict with the protections granted the appellees under the specific language of the First Amendment to the Constitution of the United States.
>
> "In failing and refusing to declare that the Initiated Act No, 1 of 1928 was void because it conflicts with the equal portection of the laws clause contained in

Amendment 14 to the Constitution of the United States.

"In failing and refusing to declare that Initiated Act No 1 was unconstitutional and void in that it is so vague and indefinite as to conflict with the due process clause of Amendment 14 to the Constitution of the United States.

"In failing and refusing to declare that Initiated Act No. 1 was unconstitutional and void in that it was arbitrary and capricious and in conflict with the due process clause of the Constitution of the United States.

"In failing and refusing to declare Initiated Act No. 1 unconstitutional and void in that it conflicted with the provisions of Amendment 1 of the Constitution of the United States guaranteeing the freedom of religion."

On July 26, 1967, the Supreme Court of Arkansas, in a *per curiam* order, denied to appellants the requested rehearing, and thereby affirmed its holding that the Arkansas "anti-evolution" statute did not violate the Constitution of the United States in each and every particular argued by appellants. The denial of this requested rehearing by the Supreme Court of Arkansas made its decision final as of July 26, 1967, and the appellants have no other recourse in State courts to present the constitutional questions raised in this action.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

To what extent can a state government, by statute, suppress the search for knowledge, for truth and the desire to educate future generations? The scope of this question

is not novel to the United States Supreme Court, and the answer given on this appeal will affect not only the appellants involved, but will define, further, the rights of all citizens, now and in the future, to the freedom to learn, to probe, to evaluate, to teach, to discuss and to think.

The State of Arkansas, by its highest Court, has decided that it can enact a statute, under the guise of controlling educational curriculum in its public schools, proscribing the teaching of any theory that man ascended or descended from a lower order of animals. If this can be done in our society, validly, then just as surely the state can enact statutes proscribing the teaching of any subject or theroy, be it geometric progression, history, nuclear fission, English literature, Latin, or what not. In the instant case the ban was held valid not on the basis that the theory is dangerous to the health, safety or morals of society, but rather on the ground that it was a valid exercise of the state's power to specify the curriculum in its public schools. What is to prevent the state, then, from enacting statues proscribing all learning, all inquiry, and all teaching under the same power? No restraint or restriction is placed on this power, and if it is held to exist the only possible restraint rests in the hands of the political majority for so long as they have the right to vote.

After announcing that the Arkansas anti-evolution statute was a valid enactment by the state, the Arkansas Supreme Court added an interesting, but bewildering, second sentence to its two sentence *per curiam* order (which additional sentence brought on one more dissent, by Ward, J.). By that sentence the Court stated "it expressed no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not be-

ing necessary to a decision in the case, and the issue not having been raised". This necessitates a brief review of the position of the case before that Court.

Mrs. Epperson, by her complaint for a declaratory judgment that the statute is unconstitutional, sought clarification of the untenable position in which she found herself. As a teacher of biology in the public schools of Arkansas she had been furnished a prescribed textbook containing the details of the theory that man ascended or descended from a lower order of animals. Being aware that this law made it a criminal act to teach this doctrine, or, to use a textbook that taught the docrine, she filed her peition (R. 2; 78). Obviously, this raised the issue whether the Act prohibits any explanation of the theory, or, alternatively, whether it prohibited teaching that the theory is true. Her petition states:

> "Plaintiff intends to acquaint her students with the facts respecting this theory because plaintfif believes that scholarship cannot flourish in an atmosphere of academic and intellectual restraint and that teachers and students must be free to inquire, to study, and to evaluate. Plaintiff does not intend to ask or require that said scientific theory or hypothesis be accepted or rejected by the students. Plaintiff believes, however, that there can be no acceptance of any theory or hypothesis in the darkness of ignorance" (R. 3, 4).

The lower Court faced this issue squarely, in its written opinion when it stated:

> "In view of the testimony of plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory (of the evolution of man) . . . this court can find no 'exigent and obviously com-

pelling' reason to prohibit a teacher from presenting and explaining the theory, along with other theories . . . which a student may accept or reject . . . By use of the word 'teach' the court accepts the common definition 'to make aware of by information or to impart the knowledge of'. That this is the meaning of the word 'teach' intended by the statute is obvious since the statute forbids any teacher . . . to adopt 'a textbook that *teaches* the . . . theory'. (R. 66).

"The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them." (R. 65).

If, as the Arkansas Court has now held, the Act in constitutional, by its specific terms the act of "teaching", or "using a textbook that teaches" the theory is a criminal act, and Mrs. Epperson, and all other teachers in the public schools of Arkansas become criminals if they perform the acts which she alleged in her complaint she wished to perform. Stated differently, by virtue of the decision of the Arkansas Supreme Court, and in spite of the second sentence in its "opinion", Mrs. Epperson is now effectively prevented from doing that which by her complaint in this case she alleged she desired to do, and would do, but for the Act.

Appellant Blanchard, the father of young children attending the public schools of Arkansas, is in the same untenable position as Mrs. Epperson, the only difference being that he desires his children to be exposed to, or to learn, the facts of all scientific theory. The decision of the Arkansas Court in this case sets a dangerous precedent

which grants, if allowed to stand, unlimited power to move into the totally controlled state visualized by Orwell in 1984. The freedom of speech guaranty in the First Amendment to the Constitution of the United States is also a guaranty of the freedom to learn. The Blanchard children have a constitutionally guaraneed right to access to all available scientific knowledge, be it theory or fact, and this right to learn is not, in this country, subject to the whim of the majority by the exercise of their vote. Misguided ignorance may not constitutionally suppress the quest for knowledge and the truth, even though suppression is accomplished through the power of the poll. "The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas v. Collins,* 323 U. S. 516 (1944). The freedom to learn, secured by the constitution, means freedom in one's native state, not access to freedom in a more enlightened political climate. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the states to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation . . . Teachers and students must always remain free to inquire, to study and to evaluate . . .' " *Shelton v. Tucker,* 364 U. S. 479 (1960), citing *Wieman v. Updegraff,* 344 U. S. 183 (1952), and *Sweezy v. New Hampshire,* 354 U. S. 234 (1957).

I. APPELLANTS WERE DENIED FREEDOM OF SPEECH AND FREEDOM TO LEARN

No contention is made that appellants freedom of speech gives them unrestricted and uncontrolled discretion to teach and to learn any subject they respectively select, nor do appellants contend that this freedom is not subject to exception or limitation. *Kovax v. Cooper,* 336 U. S. 77 (1948). However, appellants do urge that "for society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling". *Sweezy v. New Hampshire, supra.* While constitutional freedoms are subject to the police power of the State, "the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably". *Nashville Ry. Co. v. Walters,* 294 U. S. 405 (1934).

These freedoms cannot be extinguished under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Neither is a determination by the legislature or the political majority final; it is always subject to supervision by the courts. *Meyer v. Nebraska,* 262 U. S. 390 (1922) and *Bartels v. Iowa,* 262 U. S. 403 (1922). Appellant Epperson, by virtue of the decision of the Arkansas Supreme Court, cannot teach or use the prescribed textbook that teaches the statutory proscribed theory; and appellant Blanchard cannot have his children taught the theory. Clearly this violates their respective rights of free speech.

II. APPELLANTS WERE DENIED THE EQUAL PROTECTION OF THE LAW

In order for this statute to stand as a proscription against freedom to teach, to inquire, and to learn the theory suppressed by the statute, that theory must be construed to be so dangerous to the health, safety and morals of the people of Arkansas that it falls within that field of permissible police legislation which warrants the extinguishment of constitutional freedoms. Once the state determines to exercise that power, it owes its duty to all the people to protect them equally, and therefore if the questioned statute be considered in that category, the state must protect all students from exposure to such a corrupt and dangerous doctrine. The provisions of the questioned statute apply only to those students attending tax supported (public) schools. Is not the state required to be just as vigilant in protecting the health, safety and morals of students in parochial schools and private schools?

Regardless of the roots from which the discrimination springs, and regardless of the laudable motives of those responsible for the statute, the uncontrovertible fact remains that the terms of the Act extend the shelter of its protection to part of the students of Arkansas and leave exposed to the ravages of science those who attend parochial and private schools. Surely an act which constitutes a crime in one school cannot be permitted in the other school. "One must be ever aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination." *Reynolds v. Sims*, 377 U. S. 533 (1964).

III. APPELLANTS WERE DENIED DUE PROCESS OF LAW

The statute assailed by appellants defines as a crime the act "to teach the theory" and "to adopt or use a textbook that teaches the theory". As a criminal statute it must not be vague or indefinite and the standards of conduct which it attempts to prohibit must be defined with crystal clear certainty. If it is subject to various interpretations by different persons, then it is clearly unconstitutional. No attempt is made in the statute to define what is meant by the word "teach", so if it is subject to various definitions, then the guidelines it sets for the citizens to follow are not sufficiently defined to permit the citizens to adjust his or her conduct with any degree of assurance that he will not become, inadvertently, a criminal.

Webster's New International Dictionary, 2nd ed., lists seven varying definitions of the word "teach". The due process clause of the Constitution of the United States will not permit any criminal statute to have such a scatter-gun application, as everyone is compelled to guess just exactly what the statute covers. "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U. S. 147 (1959).

IV. APPELLANTS WERE DENIED RELIGIOUS FREEDOM

When freedom of inquiry, freedom of study and freedom to learn are made subordinate to the religious beliefs of the majority, academic freedom becomes sub-

servient to religious doctrine and this is specifically prohibited by the Constitution of the United States. The statute under attack does not limit the prohibition to teaching that the theory is true, it simply denies the teacher and the school authorities from making known to the student that such a theory has been advanced, whether it is true or untrue. Appellants do not construe the Darwinian Theory as attacking and being inconsistent with the story of the creation of the earth, as set forth in the Christian Bible. However, one of the great arguments of the proponents of the "anti-evolution" statute is this Biblical inconsistency, which, perforce, casts the argument to that extent into a religious role. Therefore, it becomes necessary to examine the statute considered in the light of the First Amendment to the Constitution of the United States and its expressed guaranty of freedom of religion.

We think it will be conceded that neither the state nor the federal government could force the teaching of the Darwinian Theory as a religious belief. Can the state, therefore, suppress the teaching of the theory on the grounds that it is an anti-belief? "However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Burstyn v. Wilson*, 343 U. S. 495 (1951). "Neither can con-

stitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins,* 367 U. S. 488 (1961).

V. THE EFFECTS OF THE STATUTE

If what the scholar may study is based upon the acceptance by the political majority as inoffensive and true, then the scholar has no right of personal evaluation. He is confined within the walls of the understanding of the majority and his search for greater understanding and a new maturity is doomed to stagnation. The "anti-evolution" statute of Arkansas deny appellants and numeorus. others similarly situated in Arkansas their constitutionally guaranteed right to study, to evaluate, to learn, to probe, and to inquire. They are, instead, relegated to total darkness in the area of understanding which, if they were permitted access to the theory, might strengthen the very belief the proponents of the statute seek to foster.

Man has sought to learn the truth, in order to devise a Utopian system of living together in society, ever since the first syllable of recorded history. This quest has not been an easy one in the face of political majorities who have devised hemlock, stake-burning, hanging, and all forms of physical and mental torture, to maintain the status quo of their unenlightenment and then accepted beliefs.

It is the contention of appellants that the intent and meaning of the First and Fourteenth Amendments to the Constitution of the United States, as originally adopted, and as considered in the light of the meaning and purpose of 20th Century living in the United States, require the free exchange of all scientific theory, no matter whether the inquiry directs itself to government, sociology, biology, religion or space travel. The Arkansas statute here considered, if permitted to stand in the face of these constitutional guaranties, makes all of them meaningless, and permits state government to retrogress to proscription of all learning, probing, evaluating and search for greater truths, no matter what the subject or the purpose of the scholar's inquiry. Therefore, the statute must be voided to preserve these freedoms of appellants, and of all others.

Traditional concepts of teaching have been made in harmonious if not divorced, by the holding of the Arkansas Supreme Court. Is there a difference between "explaining" a theory in a classroom and "teaching" a theory? It is the position of the appellants that there is no way to determine when a teacher in a classroom stops "teaching" and starts "explaining", or vica versa. Classroom discussion and explanation by the teacher is one of the essential elements of teaching. This the Arkansas statute prohibits and such attempted state prohibitions are specifically denied to the several states by the Constitution of the United States.

CONCLUSION

It is submitted that the decision of the Supreme Court of Arkansas erroneously upheld the constitutionality of the statutes involved; that the questions presented are so substantial as to require plenary consideration for their resolution, and upon consideration thereon the Court should reverse the judgment below.

Respectfully submitted,

EUGENE R. WARREN

BRUCE T. BULLION

WARREN & BULLION, ESQS.
1450 Tower Building
Little Rock, Arkansas

Attorneys for Appellants

November, 1967

APPENDIX

APPENDIX

OPINION OF THE SUPREME COURT OF ARKANSAS

Present: All the Justices

Opinion Per curiam

* * * * *

Supreme Court of Arkansas

No. 5-4127

Opinion Delivered June 5, 1967

Appeal from Pulaski Chancery Court, First Division

Reversed and dismissed

* * * * *

State of Arkansas

—v—

Susan Epperson and H. H. Blanchard

* * * * *

Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. Sec. 80-1627 and 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

The decree is reversed and the cause dismissed.

Ward, J., concurs. Brown, J., dissents.

June 5, 1967

FINAL ORDER OF THE SUPREME COURT OF ARKANSAS

Proceedings of a Special Session on Wednesday, July 26, 1967. Court convened pursuant to the call of the Chief Justice.

Present: Carleton Harris, Chief Justice; George Rose Smith; J. Fred Jones; Paul Ward; John A. Fogleman; Conley Byrd.

Absent: Lyle Brown

Court met this day and made the following orders:

Rehearing Petitions Denied. Petitions for rehearing were denied in the following causes:

. . . . .

#4127 State of Arkansas v. Susan Epperson, et al.

. . . . .

July 26, 1967

OPINION OF THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS, FIRST DIVISION, No. 131575

Susan Epperson, Plaintiff

—v.—

W. C. McDonald, Russell Matson, Warren Bass, James M. Coates, Dr. John A. Harrell and Mrs. Frank Gordon, as Directors of Little Rock School District, and Floyd Parsons, as Superintendent of Schools, Defendants
Hubert H. Blanchard, Jr., Intervenor

MEMORANDUM OPINION

This is an action instituted by the plaintiff, as a citizen and resident of Little Rock, Pulaski County, Arkansas, and as a teacher at Little Rock Central High School, employed by the Directors of the Little Rock School District, seeking a declaratory judgment and injunctive relief. Intervenor, Hubert H. Blanchard, Jr., intervened in the action, seeking a declaratory judgment under the terms of the Arkansas Declaratory Judgment Act (Ark. Stats. 34-2501 through 34-2512).

Both the plaintiff and the intervenor allege that Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) is unconstitutional and void because the act contravenes certain provisions of the Constitution of the United States and the Constitution of the State of Arkansas.

Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) reads as follows:

> "80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the

doctrine or theory that mankind descended or ascended from a lower order or animals."

"80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOK MENTIONING DOCTRINE — PENALTIES — POSITIONS TO BE VACATED. — Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (Sec. 80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

Section 4 of Article 14 of the Constitution of the State of Arkansas reads as follows:

"Section 4. SUPERVISION OF SCHOOLS. — The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The First Amendment to the Constitution of the United States reads as follows:

"(RELIGIOUS AND POLITICAL FREEDOM.) — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "Sec. 1. (CITIZENSHIP — DUE PROCESS OF LAW — EQUAL PROTECTION.) — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Let it be understood at the outset that this Court is not unmindful of the public interest in this case, or of the vital concern of many people in what theories may be taught in the schools, colleges and universities of this state.

The engrossing questions relating to the origin of man, the destiny of man, and the creation of the universe have engaged the thoughts and demanded the attention of the world's greatest philosophers, scientists, theologians, and educators. These questions cannot be answered by the enactment of laws or by the decisions of courts.

In view of the fact that many people have apparently misinterpreted the decisions of the United States Supreme Court regarding the teaching of the Bible in the public schools of our Nation, an explanatory statement seems appropriate. Statements are frequently heard such as "the Bible has been banned from the schools" and "the Bible cannot be taught in the schools". Such statements are not consistent with the language of the decisions of the Supreme Court. In the recent case of *Abington School Dis-*

trict v. Schempp, 374 U. S. 203, 10 L. ed. 2nd 844, Mr. Justice Clark, speaking for the Court, made the following statement:

> "In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such a study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."

Judge Clark's opinion speaks for the majority and its language refutes any contention that the Bible or religion may not be taught in the schools nor studied in the schools.

In a concurring opinion in the same case Judge Brennan said:

> "The holding of the Court today plainly does not foreclose the teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not."

This Court does not interpret the decisions of the United States Supreme Court as prohibiting the teaching

of the Bible in the public schools. It is not the teaching of the Bible account of the creation of man contained in the Book of Genesis that is prohibited in the public schools, but it is the conduct of "a religious observation", or, "a religious exercise" which the Supreme Court has said the Constitution prohibits. The Supreme Court has ruled that school boards and officials cannot prescribe and require an official prayer, but this is far from ruling the Bible out of the public schools, statements to the contrary notwithstanding.

Religious practices may be tested or challenged in courts, but religious beliefs or experiences are beyond the competency of courts to prove or disprove. The truth or the fallacy of a scientific theory or doctrine (like a religious doctrine or belief) is not a triable issue in court.

The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether "the theory or doctrine that mankind ascended or descended from a lower order of animals" is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them.

Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. "Teachers and students must always remain free to inquire, to study and to evaluate." *Shelton v. Tucker,* 364 U. S. 479, 5 L. ed. 2nd 231.

The field of science necessarily involves the discussion and evaluation of *speculative theories*. This has been recognized by the Supreme Court of the United States in the following language:

> "For society's good — if understanding be an essential need of society — inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling." *Sweezy v. New Hampshire,* 354 U. S. 234, 1 L. ed. 2nd 1311.

In view of the testimony of the plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory that mankind ascended or descended from a lower order of animals, set out in the textbook adopted by the Little Rock School Administration, this Court can find no "exigent and obviously compelling" reason to prohibit a teacher from presenting and explaining the theory along with other theories or doctrines which a student may accept or reject, even though the theory may be objectionable to many of our citizens. By use of the word "teach" the court accepts the common definition "to make aware of by information or to impart the knowledge of". That this is the meaning of the word "teach" intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt "a textbook that *teaches* the doctrine or theory".

This Court has carefully considered the holding in the

Scopes case. *Scopes v. State of Tennessee,* 154 Tenn. 105, 289 S. W. 363. It seems that the decision in that case was based principally upon the theory that "In dealing with its own employees engaged upon its own work, the State is now hampered by the limitation . . . . of the Fourteenth Amendment to the Constitution of the United States". Counsel for plaintiff and intervenor contend that the Scopes case has been completely overruled while the Attorney General argues that the decision in that case has only been modified. Even if the decision has not been completely overruled by later decisions of the United States Supreme Court, it is the opinion of this Court that the holding in the Scopes case has been modified and made obsolete to such an extent that it does not apply to the case at bar and that it should not be followed. *Gitlow v. New York,* 268 U. S. 652, 69 L. ed. 1138; *Torcaso v. Watkins,* 367 U. S. 488, 6 L. ed. 2nd 982; *Beilan v. Board of Education,* 357 U. S. 399, 2 L. ed. 2nd 1414.

The Fourteenth Amendment to the United States Constitution encompasses the first ten amendments to the Constitution and the guarantees therein contained. A state may not extinguish the freedoms guaranteed by the Constitution arbitrarily or unreasonably even in the exercise of the police power. Whether a statute is wise or unwise is not for the courts to say, but whether it is reasonable or unreasonable is for the courts to determine. The decision of the United States Supreme Court in the case of *Bartels v. Iowa,* 262 U. S. 403, 67 L. ed. 1047, appears to be in point. In that case the state had enacted a statute forbidding the teaching of foreign languages in the public schools. This statute followed the first World War and it was presumed that the German language was not popular with a majority of the citizens of the state. Nevertheless, the United

States Supreme Court held that such an act was arbitrary and unreasonable.

This Court is of the opinion that Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be suppressed by the state. If it should be held that the teaching of such a theory does constitute such a hazard, then the statute in question obviously fails to protect the student in a private school from the hazard and thus denies the equal protection of the law.

Many people do not agree with the decision of the United States Supreme Court. Others will agree with them. But it is the duty and responsibility of trial courts to follow the decisions of the Supreme Court even when we may not agree with them, if we are going to maintain our constitutional principles. This Court is not unmindful of the general rule that statutes should not be held constitutional where constitutionality is subject to doubt. In the Court's opinion the unconstitutionality of the statute under consideration is not subject to doubt, irrespective of the motives of those who secured its passage.

Therefore, it is the opinion and ruling of this Court that a decree be entered declaring Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) unconstitutional and void, and that the defendants have no authority to

proceed under the act or to enforce the provisions thereof.

No testimony was offered or showing made in this action that the defendants, as Directors and Superintendent of the Little Rock School District, have threatened or have indicated any intention to dismiss plaintiff from her teaching position, or to cancel her contract to teach in the public schools of Little Rock. Counsel for the Directors of the Little Rock School District and the Superintendent of Schools, who are defendants in this case, announced in open court that the School Board and the school officials would follow the decree of this Court. In view of that statement the Court deems it unnecessary to issue an injunction at this time in aid of the declaratory judgment. However, if an effort is made in the future to enforce the statute an injunction would be appropriate.

Counsel for plaintiff and intervenor will prepare a precedent for decree consistent with this opinion and submit the precedent to opposing counsel for approval as to form and then this Court for consideration and signature.

Murray O. Reed, Chancellor

Date: May 27, 1966

DECREE OF THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS, NO. 131575.

This cause is this day submitted to the Court for its consideration and decree. The plaintiff and intervenor were represented by their attorney, Eugene R. Warren, Esq., the defendants by their attorney, Herschel H. Friday, Jr., Esq., and the State of Arkansas by its attorneys, Hon-

orable Bruce Bennett, Attorney General and Honorable Fletcher Jackson, Assistant Attorney General. The cause was submitted to the Court upon the complaint of the plaintiff, the intervention of the intervenor, the answer of the defendant and the answer of the State of Arkansas, and upon testimony of witnesses for both the plaintiff and the intervenor and the State of Arkansas and documentary evidence, from all of which the Court finds:

1. Initiated Act No. 1 of 1928 (Ark. Stat. 80-1627 and 80-1628) is unconstitutional and void.

2. It is unnecessary that an injunction be issued at this time in aid of this declaratory judgment. The Court should, however, retain jurisdiction of the cause to issue an injunction if any effort is made in the future to enforce said unconstitutional and void statute.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void. The Court retains jurisdiction of this cause to issue such orders as may be necessary in aid of this declaratory judgment. The memorandum opinion heretofore issued by the Court is made a part of this decree. Each party, hereto, shall bear his respective cost herein expended.

MURRAY O. REED, Chancellor

Date: June 16, 1966

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 7

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants,*

v.

STATE OF ARKANSAS, ... *Appellee.*

MOTION TO DISMISS

JOE PURCELL

Attorney General
State of Arkansas

Justice Building
Little Rock, Arkansas 72201

Attorney for Appellee

PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967
No. 749

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants.*

v.

STATE OF ARKANSAS, ... *Appellee.*

MOTION TO DISMISS

CITATION TO OPINION BELOW

The decree entered by the Pulaski Chancery Court on June 16, 1966, was accompanied by a written opinion. That opinion, which is not officially reported, is set out in Appendix, page 21, of Appellants' Jurisdictional Statement. The opinion of the Supreme Court of Arkansas is set out in the Appendix, page 19, of Appellants' Jurisdictional Statement.

JURISDICTION

The appellants are attempting to appeal from a final order of the Supreme Court of Arkansas on July 26, 1967. The appellants cite 28 U.S.C. 1257 (2) as authority to appeal to this Court as they assert that Ark. Stat. Ann. §§ 80-1627 and 80-1628 (Repl. 1960) are unconstitutional and void as the above act violated their respective

constitutional rights guaranteed to the appellants by the First and Fourteenth Amendments to the Constitution of the United States. Appellee contends that it is clear from the record and from the statutes themselves that the statutes mentioned are a valid exercise of the State's power to specify the curriculum in its public schools and are not unconstitutional and therefore the appeal should be dismissed.

STATUTORY PROVISIONS INVOLVED

The statutes involved in this litigation are:

Ark. Stat. Ann. §80-1627 (Repl. 1960);

Ark. Stat. Ann §80-1628 (Repl. 1960).

STATEMENT OF THE CASE

The statement of the case included in the appellants' jurisdictional statement on pages 5, 6, and 7 sets out the material facts relative to this case. However, it is important to note that the State's position throughout has been that the statutes complained of are a valid exercise of the State's authority to regulate the curriculum in her public schools. This finding was upheld by the Supreme Court of the State of Arkansas.

QUESTIONS PRESENTED

The questions set out in the brief of the appellants fairly state the questions presented to this Court.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I

The appellants were not denied freedom of speech or freedom to learn or freedom of religion.

For appellants' first point, they assert that "[t]he statute violates Amendment 1 of the Constitution of the United States."

It is axiomatic that a teacher has freedom of speech; however, it is not absolute, but is limited. However, there should be, and is, a control over the classroom teacher, his or her method of teaching, and the subjects which are taught, and the State, as well as the professional educators, should exercise the control. The professional educators are in charge only as servants of the State, and it must be kept in mind that their *ultimate* employer *is* the State. In other words, the professional educators work *for* the State, and the State should and does have the final authority in determining the laws and policies which are adopted for the operation of the school. Appellants evidently want professional educators placed in a position away from State influence, the only part which the State is permitted to play being to pay the cost of construction and maintenance of the tower.

We submit that the American people have never abandoned to anyone the *sole* responsibility for selecting the course of study in our schools. We want to emphasize here that we are not referring to or judging the appellant herein, but we believe the Court should take judicial notice of the fact that many individuals, teachers included, espouse a philosophy which is not representative of the beliefs of the people as a whole, nor conducive

to the welfare of the Nation as a whole. In a democracy, the majority rules, and the people have it within their power to enact the laws whereby they shall be governed, regardless of whether one or more educators approve of them. Therefore, when dealing with a public institution, such as schools, the State has the right and responsibility to limit the teacher's classroom activities for the best interest of all the people.

The Appellants also claim that they are denied freedom of religion because of the statutes prohibiting the teaching the Darwinian Theory. The purpose of the statute is not necessarily to protect the Christian religion, but we believe that the people of the State of Arkansas have a right to pass such legislation for reasons other than the protection of their religious beliefs. Even if the facts were that the law was enacted to keep theories out of public schools which would contradict the story of the creation of the earth, as set forth in the Christian Bible, it still would not be unconstitutional.

II

Appellants were not denied the equal protection of the law.

Appellants contend for their second point that "The statute is void under the equal protection of the law clause of the 14th Amendment to the Constitution of the United States."

Appellants contend that the police power may not be exercised except where there is a clear and present danger to the people of the state.

On this we disagree. We believe that in the employer-employee relationship such a situation is not re-

quired. In the employer-employee cases, what is determinative is not whether there is a "clear and present danger" but whether the rules and regulations are reasonable. The validity of these statutes does not have to depend, however, on the authority of the State to enact them under its police power, since the State clearly has the authority to enact them *irrespective* of its police power.

Appellants assert that the statutes fall under the equal protection clause because the statutes apply only to public schools and do not apply to parochial or other private schools.

The error of the appellants, we believe, is that "students" is a broad classification and the classification should be broken down into public, private, and parochial schools.

The "students" attending public schools are not in the "same classification" as students attending the other two types of schools. If there is proper classification, then the statutes do not run afoul of the equal protection clause. 16A C.J.S., CONSTITUTIONAL LAW, §505 (b) (2), p. 314. For a case somewhat in point, see *Steele* v. *Sexton*, 234 N.W. 436 (1931), wherein it was held that there was no merit to the contention that a ban on fraternities in public schools discriminated in favor of private schools.

The separate classification of students attending public, parochial, or other private schools is a valid classification. The State has a vital interest in its public schools, and may validly exercise more control over them than over strictly private schools.

III

Appellants were not denied due process of law.

For their third point appellants state that "[t]he statute conflicts with the due process clause of Amendment 14 to the Constitution of the United States in that it is vague and indefinite."

In reading plaintiffs' complaint, we find the allegation that she (Mrs. Epperson) will violate the statutes unless they are declared unconstitutional. The complaint reads:

> (V) . . . Plaintiff intends to discuss and explain said theory or doctrine to her students notwithstanding the provisions of said statutes • • •
>
> (VIII) Plaintiff states that unless this Honorable Court enters its judgment and decree holding Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void, plaintiff will be subject to fine and dismissal from her teaching position. Plaintiff states that the defendants will have no alternative but to dismiss plaintiff from her teaching position in the event the provisions of said act are invoked against plaintiff. . . .

It seems to us that appellant knew what the statutes meant when she filed her complaint, and, therefore, it is absurd for her to now say that the statutes are vague and that she does not understand them.

The issue of vagueness was raised in *Scopes* v *State*, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927), and was discussed at length in the Court's opinion. The Tennessee statute is not nearly as definite and certain

as the Arkansas statutes are; nevertheless, the Tennessee Court held that their statute was not vague and uncertain. Please note that the Arkansas statutes were drafted and passed in 1928, which was subsequent to the rendition of the *Scopes* decision in 1927, the Arkansas statutes being very carefully drawn in the light of the opinion in *Scopes*.

In their attempt to show vagueness, appellants take certain words in the statute out of context and play with them, *e.g.* the words "teach" and "textbook." Anyone can take words out of context, play with their meaning, and make any statute seem vague and uncertain. But, this is not the way the law looks at statutes.

IV

The effect of the statutes.

The discussion of appellants Part V on the effect of the statutes is only argument which has been presented earlier in our motion to dismiss, and for these reasons do not need to be reiterated here.

CONCLUSION

Therefore, for the foregoing reasons, the appellee submits that our motion to dismiss should be granted.

Respectfully submitted,

JOE PURCELL

Attorney General
State of Arkansas

Justice Building
Little Rock, Arkansas 72201

Attorney for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 7

SUSAN EPPERSON and H. H. BLANCHARD,
Appellants,

v.

STATE OF ARKANSAS,
Appellee.

Appeal from the Supreme Court of Arkansas.

BRIEF FOR APPELLANTS.

EUGENE R. WARREN,
BRUCE T. BULLION,
1450 Tower Building,
Little Rock, Arkansas,
Attorneys for Appellants.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 749.

SUSAN EPPERSON and H. H. BLANCHARD,
Appellants,

v.

STATE OF ARKANSAS,
Appellee.

Appeal from the Supreme Court of Arkansas.

BRIEF FOR APPELLANTS.

PRELIMINARY STATEMENT.

This important case presents the question whether the United States Constitution invalidates those laws of Arkansas which prohibit the "teaching", and penalizes any teacher in tax-supported schools of the State of Arkansas in "teaching" the theory or doctrine that mankind ascended or descended from a lower order of animals, or to select, adopt or use a textbook that "teaches" such a doctrine or theory—the anti-evolution or anti-Darwinian laws

of Arkansas. It gives this Court an appropriate opportunity to strike down, once again, governmental suppression of intellectual freedom—the ceaseless quest of man to learn the truth. This Court has never ruled on the constitutionality of the anti-evolution laws promulgated in this country and to that extent the question is novel. However, in the encompassing dedication of this Court to zealously protect this most basic of all freedoms, that novelty loses some of its flavor, but not its savor.

CITATION TO OPINIONS BELOW.

The opinion of the Chancery Court of Pulaski County, Arkansas (A. 93-102) is not officially reported. The opinion of the Supreme Court of Arkansas is reported at 242 Ark. (Advance Reports) 922 (A. 103).

JURISDICTION.

Susan Epperson, a teacher employed by the Little Rock School District to teach the subject of biology at Central High School for the school year 1965-1966, on December 6, 1965 filed her complaint in the Chancery Court of Pulaski County, Arkansas, seeking to enjoin the Little Rock school authorities from enforcing the Arkansas anti-evolution statutes, Ark. Stats. Anno., 1947, Secs. 80-1627 and 80-1628, and to declare said law to be in violation of her (and all other teachers in Arkansas similarly situated) constitutional rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States (A. 3-7). As required by the procedural statutes of Arkansas, in addition to serving a copy of the complaint on the individual members of the School Board and Superintendent, service was had upon the Attorney General of the State of Arkansas.

On January 12, 1966, H. H. Blanchard, a parent of children attending the public schools in Pulaski County, for

himself and all other parents similarly situated, and for and on behalf of his children, filed intervention in this cause asserting the unconstitutionality of the law upon the same grounds asserted by Mrs. Epperson (A. 9-11).

All parties, including the State of Arkansas by the Attorney General, filed answer to the complaint and intervention, denying that the statute was unconstitutional (A. 8; 11; 16; 25). Trial of the cause was held on April 2, 1966, by the Pulaski County Chancery Court, the Attorney General taking the lead in presenting the defense. Honorable Murray Reed, Chancellor, issued his written Memorandum Opinion (A. 93-101) on May 27, 1966, declaring said statutes to be violative of the First and Fourteenth Amendments to the Constitution of the United States. On June 16, 1966, Judge Reed entered formal decree to this effect, thereby voiding the Act (A. 101).

The Attorney General, for the State of Arkansas, appealed this adverse ruling to the Supreme Court of Arkansas, and on June 5, 1967 that Court, in a brief two-sentence *per curiam* opinion, reversed and dismissed the case (A. 103), holding that the questioned statute was "a valid exercise of the state's power to specify the curriculum in its public schools". The judgment of the Supreme Court of Arkansas, reversing and dismissing the complaint and intervention, was entered on June 5, 1967 (A. 104).

Mrs. Epperson and Mr. Blanchard filed petition for rehearing, with supporting brief, with the Arkansas Supreme Court, reasserting their argument that the questioned Act violated the First and Fourteenth Amendments to the Constitution of the U. S., and on July 26, 1967 this final procedural recourse was denied to them (A. 110). Notice of Appeal to the Supreme Court of the United States, by Mrs. Epperson and Mr. Blanchard, was filed in the Supreme Court of Arkansas on September 25, 1967 (A. 110). Jurisdiction of this Court rests upon 28 U. S. C.,

Section 1257 (2). **Williams v. Bruffy**, 96 U. S. 176 (1877); **Largent v. Texas**, 318 U. S. 418 (1943); **Griswold v. Connecticut**, 381 U. S. 479 (1965). Probable jurisdiction was noted on March 4, 1968.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Supreme Court of Arkansas has held valid and constitutional the following statutes of Arkansas which are codified in the Arkansas Statutes Annotated, 1947, as follows:

> SECTION 80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED. It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
>
> SECTION 80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE. PENALTIES. POSITIONS TO BE VACATED. Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or adopting any such textbooks

in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member (A. 5, 6).

2. This case also involves the First and the Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED.

1. Do the Arkansas Antievolution Laws violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by defining as a crime, in vague and indefinite terms, "to teach the theory"?

2. Do the Arkansas Antievolution Laws violate the First and Fourteenth Amendments to the Constitution of the United States by denying to appellants the rights of freedom of speech, of thought and expression, and the right to teach and the freedom to learn?

3. Do the Arkansas Antievolution Laws violate the Fourteenth Amendment to the Constitution of the United States, assuming they are construed to fall into the category of permissible police legislation which would warrant the extinguishment of the freedom of speech and the freedom to learn, in that they deny to appellants the Equal Protection of the laws by limiting its applicability to "tax-supported" schools?

4. Do the Arkansas Antievolution Laws violate Amendment One to the Constitution of the United States by denying to appellants their guaranteed freedom of religion?

STATEMENT OF THE CASE.

Initiated Act No. 1 (now codified as Sections 80-1627 and 80-1628, Arkansas Statutes Annotated, 1947; hereinafter referred to as Arkansas Antievolution Law) was adopted by vote of the people of Arkansas in the year 1928 by a vote of 108,991 for adoption, and 63,406 against adoption. At that time Arkansas enjoyed a population of approximately 1,854,482 persons, according to the 1930 U. S. Census. This adoption was accomplished three years after the State of Tennessee adopted its antievolution law, which, though not identical in wording can be said, we think, to have been designed for the same purpose and reached the same result. Chapter 27, Acts of Tennessee for 1925 (Tennessee Code Annotated, Section 49-1922).

The Arkansas Antievolution Act is set forth in detail elsewhere in this brief and is not repeated for the sake of brevity. The design of the Arkansas Act, criminal in nature, makes it unlawful to "teach" the theory that mankind ascended or descended from a lower order of animals, or, to adopt or use a textbook that "teaches" such a doctrine. Violation of the law subjects one to a maximum fine of $500 and forfeiture of employment.

Mrs. Epperson and Mr. Blanchard, by their respective complaint (A. 3-7) and intervention (A. 9-11) sought a declaratory judgment in the Chancery Court of Pulaski County, Arkansas, to declare said Act to be void as an unconstitutional restraint on liberties guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The Chancery Court, after trial and argument, entered a decree declaring said Act to be unconstitutional upon the grounds advanced in the pleadings (A. 93-101). On appeal, the Arkansas Supreme Court reversed the Pulaski Chancery Court and held

that the questioned Act was constitutional as "a valid exercise of the state's power to specify the curriculum in its public schools" (A. 103). The Epperson complaint and the Blanchard intervention were thereupon dismissed as without merit (A. 104). Appellants petitioned the Arkansas Supreme Court for rehearing, but this was denied by that Court (A. 110), and the questions of constitutionality are now before this Court.

The opinion of the Arkansas Supreme Court is notable only for its brevity, and this in spite of the questions involved. No guidelines (except by negative inference) can be gleaned therefrom, and its reasons for reaching its determination remain unexplained. The reader must accept, at face value, the fact that the Court found no constitutional infringement; or, if infringement might have been detected, that the Court determined the power of the state to **specify** the curriculum in its public schools was greater, more potent and more meaningful than the constitutional freedoms curtailed.

Appellants perceive, and argue, that there is a vast difference between the power of a state to **prescribe** its school curriculum, as distinguished from its power to **proscribe** that school function. On the one hand guaranteed constitutional liberties may not be involved (although this question is not before the Court we refer to it, *arguendo*), and the state's power to **prescribe** may be unlimited. On the other hand, the power of a state to limit or prohibit the free exchange of knowledge and ideas is greatly limited by the First and Fourteenth Amendments, as pronounced by this Court, and this limitation the Arkansas Supreme Court has ignored. That is to say, the Arkansas Supreme Court, by its use of the word "specify" in connection with state power over subjects and theories to be taught in its schools, perforce included the power to "prescribe" and to "proscribe"

with equal force, and in this latter respect appellants urge that the Arkansas Supreme Court grievously erred.

Much has been written and said about the famous **Scopes** case, *infra*, which involved the Tennessee statute designed to relegate to darkness in that jurisdiction the theory of evolution. That case was tried on the impossible basis of whether the evolution theory was true or false, theistic or antiestic, and a reading of the reported case does not lend any aid or comfort to that argument. On the other hand, this case does not present that intriguing, but illusive, question, and the truth or falsity of the theory of evolution, or the Biblical story of the creation of man, is not in issue. The question here centers about the constitutional limitations upon the several states to prohibit the free exchange of knowledge or theories.

SUMMARY OF ARGUMENT.

This case challenges the validity of the Arkansas Anti-evolution Act in the following particulars: (1) that Mrs. Epperson is, by the Act, denied Due Process of Law in that the term "to teach the theory" is so vague and uncertain and subject to so many definitions that it furnishes insufficient guidelines for a valid criminal law; (2) that appellants have been denied Freedom of Speech (which includes Freedom to Learn) by the Act's proscription of the theory, not held to be inimical to the health, safety or morals of the citizens of the state; (3) that the limitation of the Act's proscription to "teaching the theory" in tax-supported schools only denies to appellants the Equal Protection of the Laws; and (4) the connotation that the Act's proscription "protects" a religious belief denies to appellants Religious Freedom.

ARGUMENT.

I.

The Act Denies Due Process of Law.

The Act defines as a crime "to 'teach' the theory", and "to adopt or use a textbook that 'teaches' the theory". The immediate question presented is what is it that the Act seeks to prohibit and, concomitantly, what constitutes "teaching". Is one subject to the provisions of the Act prevented from "teaching" students, or a student from being informed, either by oral or printed word, that such a theory exists and the details of that theory; or, is one enjoined, after exercising a right to "teach" the existence of the theory, from "teaching" that the theory is true or untrue?

Mrs. Epperson, in her complaint (A. 4, 5), alleged that she intended to "acquaint her students with the facts respecting this theory . . . but did not intend to ask or require that the theory be either accepted or rejected by the students". The Chancery Court, making specific note of this allegation, and accepting it, thereupon adopted the definition of the word "teach" to be "to make aware of by information or impart the knowledge of". In spite of this specific allegation and holding, the Arkansas Supreme Court, by its holding of "no opinion on the question whether the Act prohibits any explanation of the theory . . . or merely prohibits teaching that the theory is true", removed any and every possible certainty of the meaning of the proscribed criminal conduct "to teach the theory" and so places the citizen in the untenable position of being unable to adjust his conduct with assurance that he will not become an inadvertent criminal.

Webster's New International Dictionary, 2d Ed., lists seven varying definitions of the word "teach". Without

some further guidelines in this Act which more clearly defines the prohibition imposed, uncertainty and vagueness as to its meaning and applicability exists, and this is not permitted by the Due Process Clause of the United States Constitution. A wealth of ancient and modern authority expressing adherence to this sound tenet of law could be cited in support of this principle, but the rule is so elemental, and so unanimously and firmly established, it is thought that such a pedantic display would add nothing to this argument. Instead, we refer to a statement, particularly applicable to the case at bar, appearing in **Smith v. California,** 361 U. S. 147 (1959): "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 U. S. 507 (1948)".

No argument of force can be advanced that by virtue of the holding of the Arkansas Supreme Court in this case, "the free dissemination of ideas (is) the loser". Teachers in the tax-supported schools of Arkansas, at this time, dare not mention to their students the theory of evolution without fear of becoming a criminal and subject to the punishment prescribed by the Act, and students therefore must pass through the public schools of Arkansas without knowledge that such a theory has been advanced. In this connection the quoted statement of Dr. E. E. Reinke, professor of biology at Vanderbilt University in 1927, appearing in **Scopes v. Tennessee,** 154 Tenn. 105, 289 S. W. 363 (1927) is particularly applicable, viz.: "The theory of evolution is altogether essential to the teaching of biology and its kindred sciences. To deny the teacher of biology the use of this most fundamental generalization of his science would make his teaching as chaotic as an attempt to teach astronomy without the law of gravitation or physics without assuming the existence of the ether".

The holding of the Arkansas Supreme Court perpetuated this vague and indefinite application of this criminal Act; and thus violence is done to the Due Process Clause of the United States Constitution which requires a greater standard of definition of proscribed criminal conduct than one can glean from the questioned Act, and for this reason the Act is void.

II.

The Act Denies Freedom of Speech and Freedom to Learn.

The vague and indefinite prohibitions of the Act requires one to adopt its proscription at its most stringent level—total elimination of any expostulation of the theory of evolution, true or false, or for any purpose. Mrs. Epperson has outlined clearly that all she wished to do was to expose her students to the existence of this theory, and had no intention of insisting that those students accept or reject the hypothesis. In spite of this statement to the Court, the Arkansas Supreme Court refused to permit the Chancery Court to establish any guidelines which might be helpful and summarily dismissed the cause with the holding that the Act falls within the state's right to "specify" the curriculum in its public schools. It cannot be doubted, therefore, that the Arkansas Supreme Court has interpreted this state power to include the right to **prohibit**, as well as to **prescribe**, any subject or theory. The power of the state to prescribe the curriculum in its public schools is not involved in this appeal, and it may be that such power is total and absolute. What is involved, however, is the extent of the state's power to proscribe subjects or theory in its schools. Appellants urge that the state does not have unlimited power in this latter area and at best can proscribe only that which is reasonably determined to be inimical to public health, safety and morals. Appellants therefore argue that the broad interpretation of this state power by the Arkansas Supreme Court is a clear and dangerous denial of their, and all

other citizens, Freedom of Speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, which includes the Freedom to Learn.

Appellants do not contend that this Freedom gives them unrestricted and uncontrolled discretion to teach and to learn any subject they respectively select, nor do they contend that this Freedom is not subject to exception or limitation. We are well aware of the reasoning and principles set forth in **Kovax v. Cooper**, 336 U. S. 77 (1948), and do not disagree with or misunderstand its effect. However, appellants do urge that while constitutional freedoms are subject to the police power of the state, "the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably". **Nashville Ry. Co. v. Walters**, 294 U. S. 405 (1934). Also, "for society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling." **Sweezy v. New Hampshire**, 354 U. S. 234 (1957).

The question reduces itself to an inquiry into the extent that state government may suppress the search for knowledge, for truth and the desire to educate future generations. This question, generally, is not novel to the United States Supreme Court, and the answer given on this appeal will define further the rights of all citizens, now and in the future, to the freedom to learn, to probe, to evaluate, to teach, to discuss and to think. If the State of Arkansas can outlaw the "teaching" of the theory of evolution, then just as surely it, and all other states, can enact statutes proscribing the teaching of any subject or theory, be it geometric progression, history, nuclear fission, English literature, Latin, or what not. That is to say, nothing would prevent a state from en-

acting statutes proscribing all learning, all inquiry and all teaching. If this be the law of our land, the only restraint possible rests in the hands of the political majority for so long as they have the right to vote.

The decision of the Arkansas Cout in this case establishes the precedent which grants, if allowed to stand, unlimited power to move into the totally controlled state visualized by Orwell in his book "1984". The Blanchard children, and all other children similarly situated, have the constitutionally guaranteed right of access to all available scientific knowledge, be it theory or fact, subject only to the state's police power, and in this country this right to teach and to learn is not subject to the whim of the majority by the exercise of their vote. Misguided ignorance may not constitutionally suppress the quest for knowledge and the truth, even though suppression is accomplished through the power of the poll. "The First Amendment gives freedom of mind the same security as freedom of conscience." **Thomas v. Collins**, 323 U. S. 516 (1944).

The freedom to learn, secured by the constitution, means freedom in one's native state, not access to freedom in a more enlightened political climate. As stated in **Shelton v. Tucker**, 364 U. S. 479 (1960), citing **Wieman v. Updegraff**, 344 U. S. 183 (1952), and **Sweezy v. New Hampshire**, supra: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. 'By limiting the power of the states to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation . . . Teachers

and students must always remain free to inquire, to study and to evaluate . . .'."

These freedoms cannot be extinguished under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Neither is a determination by the legislature or the political majority final; it is always subject to supervision by the courts. **Meyer v. Nebraska**, 262 U. S. 390 (1922) and **Bartels v. Iowa**, 262 U. S. 403 (1922). If a state cannot constitutionally limit the curriculum in its schools to the English language, certainly it cannot limit the curriculum to Biblical accounts of creation; or studies of governments to republican form; or mathematical theories to the base five (or two). The Due Process guaranty denotes "the right to acquire useful knowledge", **Meyer v. Nebraska**, supra, and any statute which interferes with this liberty without reasonable relation to some purpose within the competency of the state to effect, is void. The purpose of the questioned Act is not given, none has been advanced, and the Arkansas Supreme Court elected to not enlighten thereon.

No argument is advanced here that the state, in the exercise of its legitimate power to control the education of its citizens, does not have the right to **prescribe** the curriculum in its public schools. This right, however, is quite different from what the state has accomplished by the questioned Act. The proper exercise of this state power involves the right of selection from the full gamut of subjects and theories, unfettered by proscription, except insofar as a subject or theory may be inimical to public peace, health, safety and morals. The questioned Act does not prescribe; rather, it outlaws a theory without reference to any evil it might conceivably correct. Thus, the Arkansas Supreme Court has extended state power beyond permissible limits and has infringed grossly upon the liberties

guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The intent and meaning of the First and Fourteenth Amendments to the Constitution of the United States, inter alia, requires the free exchange of all scientific theory, no matter whether the inquiry directs itself to government, sociology, biology, religion or space travel. The questioned Act, if permitted to stand, makes all of these constitutional guarantees meaningless and permits state government to retrogress to proscription of all learning, probing, evaluating and search for greater truths, no matter what the subject or what the purpose of the scholar's inquiry. Therefore, the Act must be voided to preserve these freedoms of appellants, and of all others. This is so for if what the scholar may study is based upon the acceptance by the political majority as inoffensive and true, then the scholar has no right of personal evaluation. He is confined within the walls of the understanding of the majority and his search for greater understanding and a new maturity is doomed to stagnation. The Act relegates students to total darkness in the area of understanding which, if permitted access to the theory, might strengthen the very belief the proponents of the Act seek to foster. Man's quest to learn the truth, historically, has not been an easy one in the face of political majorities who have devised hemlock, stake-burning, hanging, crucifixion and all forms of physical and mental torture, to maintain the status quo of their unenlightenment and their accepted beliefs. The Supreme Court of the United States has been ever vigilant to safeguard these vital freedoms, and to strike down the Act in question will maintain this necessary ingredient to a free society.

III.

The Act Denies the Equal Protection of the Law.

Appellants admit that the state's power to prescribe the quality of education for its citizens includes the power to

proscribe that which is reasonably determined to be dangerous to the health, safety and morals of the citizens. In order for such a proscription to be permissible in extinguishment of constitutional freedoms, the discovered danger must be real and genuine, and neither imagined nor arbitrary nor capricious. Furthermore, once the state determines to exercise that power, it owes its duty to all the people to protect them equally. If the questioned statute is considered to fall in this permissible category, the state must protect all students from exposure to such a corrupt and dangerous doctrine. The provisions of the questioned statute apply only to those students attending tax-supported (public) schools. Is not the state required to be just as vigilant in protecting the health, safety and morals of students in parochial and private schools?

Regardless of the roots from which the discrimination springs, and regardless of the laudable motives of those responsible for the statute, the uncontrovertible fact remains that the terms of the Act extend the shelter of its protection to but a portion of the students in Arkansas, and leaves exposed to the ravages of science those who attend parochial and private schools. Surely an act which constitutes a crime in one school cannot be permitted in the other school. "One must be ever aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination." **Reynolds v. Sims**, 377 U. S. 533 (1964). It would appear that the Arkansas Anti-evolution Act clearly denies the Equal Protection of the Law.

IV.

The Act Denies Religious Freedom.

It is not believed it will be denied that the motivation which brought the Arkansas Anti-evolution Act into being was religious in concept and action. The proponents of its enactment, and of its continued existence and enforce-

ment, conceive that Darwin's theory of the evolution of man expresses an anti-belief of the Bible story of God's creation of man; that it is atheistic and at complete odds with their literal belief. They deny the possibility that one can harmonize both theories and reach a theistic result. Consequently, the questioned Act was drafted, enacted and is maintained to protect their literal belief. **Scopes v. Tennessee, supra.**

When freedom of inquiry, freedom of study and freedom to learn are made subordinate to the religious beliefs of the majority, academic freedom becomes subservient to religious doctrine and this is specifically prohibited by the First and Fourteenth Amendments to the Constitution of the United States. The statute under attack does not limit the prohibition to teaching that the theory is true, it simply denies the teacher and the school authorities from making known to the student that such a theory has been advanced, whether true or untrue. Appellants do not construe the Darwinian Theory as attacking and being inconsistent with the story of the creation of the earth, as set forth in the Christian Bible, but this is neither the argument nor the question before the Court.

We think it will be conceded that neither the state nor the federal government could force the teaching of the Darwinian Theory as a religious belief. Can the state, therefore, suppress the teaching of the Theory on the grounds that it is an anti-belief? The answer to this question appears to be clearly stated in **Burstyr v. Wilson,** 343 U. S. 495 (1951): "However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications,

speeches or motion pictures." and again in **Torcaso v. Watkins**, 367 U. S. 488 (1961): "Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." The questioned Act, as an aid to religious belief is a clear violation of our Constitution.

CONCLUSION.

For the foregoing reasons the Arkansas Anti-evolution Act should be held unconstitutional, and this Court should make clear that neither Arkansas nor any other State can constitutionally prohibit man's quest for a greater understanding of truth.

All prior attempts by the several states, heretofore, to suppress the unfettered exchange of ideas, new and old, and to allow almost unlimited bounds to his search for legitimate knowledge, has been voided by this Court with admirable consistency. No sound basis exists to deviate from this unanimous principle, and appellants urge that the questioned Act be stricken because of this patent unconstitutionality.

Respectfully submitted,

EUGENE R. WARREN,

BRUCE T. BULLION,
1450 Tower Building,
Little Rock, Arkansas,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

No. [redacted] 7

1968

SUSAN EPPERSON AND H. H. BLANCHARD, *Appellants*

v.

STATE OF ARKANSAS *Appellee*

APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

JOE PURCELL
Attorney General
State of Arkansas

DON LANGSTON
Assistant Attorney General
State of Arkansas

Justice Building
Little Rock, Arkansas 72201

Attorneys for Appellee

PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 749

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

SUMMARY OF BRIEF

The statutes involved herein do not deny due process of law because of vagueness and uncertainty because they were drafted after the opinion of *Scopes* v. *State*, 154 Tenn. 105, 289 S.W. 363, and with the holding of that case in mind. The statutes are clear, definite and valid inactments. The statutes are a valid exercise of the state's power to specify the curriculum in its public schools and is not an unreasonable encroachment upon Mrs. Epperson's freedom of speech.

The statutes do not deny the equal protection of the law because the separate classification of students attending public, parochial, or private schools is a valid classification. The state has a vital interest in its public schools and may validly exercise more control over them than over strictly private schools.

The statutes do not deny religious freedom but is in fact purely an Act of neutrality and insures the completeness of separation of church and state.

BRIEF

I

The Act Does Not Deny Due Process of Law.

For their first point appellants state that the statute conflicts with the due process clause of Amendment 14 to the Constitution of the United States in that it is vague and indefinite.

In reading appellants' complaint, we find the allegation that she (Mrs. Epperson) will violate the statutes unless they are declared unconstitutional. The complaint reads:

> (V) . . . Plaintiff intends to discuss and explain said theory or doctrine to her students notwithstanding the provisions of said statutes . . .
>
> (VIII) Plaintiff states that unless this Honorable Court enters its judgment and decree holding Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void, plaintiff will be subject to fine and dismissal from her teaching position. Plaintiff states that the defendants will have no alternative but to dismiss plaintiff from her teaching position in the event the provisions of said act are invoked against plaintiff. . . .

It seems to us that appellant knew what the statutes meant when she filed her conplaint, and, therefore, it is absurd for her to now say that the statutes are vague and that she does not understand them.

The issue of vagueness was raised in *Scopes* v. *State*, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927), and

was discussed at length in the Court's opinion. The Tennessee statute is not nearly as definite and certain as the Arkansas statutes are; nevertheless, the Tennessee Court held that their statute was not vague and uncertain. It should be noted that the Arkansas statutes were drafted and passed in 1928, which was subsequent to the rendition of the *Scopes* decision in 1927, the Arkansas statutes being very carefully drawn in the light of the opinion in *Scopes*.

We quote below the pertinent part of the *Scopes* opinion and ask that the Court take particular note of the italicized portions thereof:

> While the act was not drafted with as much care as could have been desired, nevertheless there seems to be no great difficulty in determining its meaning. It is entitled:
>
> > "An act prohibiting the teaching of the evolution theory in all the Universities, normals and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof."
>
> Evolution, like prohibition, is a broad term. In recent bickering, however, evolution has been understood to mean the theory which holds that man has developed from some pre-existing lower type. This is the popular significance of evolution, just as the popular significance of prohibition is prohibition of the traffic in intoxicating liquors. It was in this sense that evolution was used in this act. It is in this sense that the word will be used in this opinion, unless the context otherwise indicates. It is only to the theory of the evolution of man from a lower type that the act before us was intended to apply and much of the discussion we have heard is beside this case. *The words of*

a statute, if in common use, are to be taken in their natural and ordinary sense. *O'Neal* v. *State,* 115 Tenn. 427, 3 L.R.A. (N.S.) 762, 90 S.W. 627; *State ex rel. Dolan* v. *Clarksville & R. Turnp. Co.* 2 Sneed, 90.

Thus, defining evolution, the act's title clearly indicates the purpose of the statute to be the prohibition of teaching in the schools of the state that man has developed or descended from some lower type or order of animals.

When the draftsman came to express this purpose in the body of the act, he first forbade the teaching of "any theory that denies the story of the divine creation of man, as taught in the Bible" — his conception evidently being that to forbid the denial of the Bible story would ban the teaching of evolution. To make the purpose more explicit, he added that it should be unlawful to teach "that man has descended from a lower order of animals."

Supplying the ellipsis in §1 of the act, it reads that it shall be unlawful for any teacher, etc., "to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead [of the story on the divine creation of man as taught in the Bible] that man as descended from a lower order of animals."

The language just quoted illustrates what is called in rhetoric exposition by iteration. The different form of the iterated idea serves to expound the first expression of the thought. The undertaking of the statute was to prevent teaching of the evolution theory. It was considered this purpose could be effected by forbidding the teaching of any theory that denied the Bible story, but to make the purpose clear it was also forbidden to teach that man descended from a lower order of animals.

This manner of expression in written instruments is common, and gives use to the maxim maxim subordinate words and phrases are modified and limited to harmonize with each other of construction "noscitur a sociis." Under this and with the leading and controlling purpose or intention of the act. For example, see *Lewis' Southerland, Stat. Constr.* §§415 *et seq.; Caldwell & Co.* v. *Lea,* 152 Tenn. 48, 272 S.W. 715.

It thus seems plain that the Legislature in this enactment only intended to forbid teaching that man descended from a lower order of animals. The denunciation of any theory denying the Bible story of creation is restricted by the caption and by the final clause of §1.

So interpreted, the statute does not seem to be uncertain in its meaning nor incapable of enforcement for such a reason, notwithstanding the great argument to the contrary. The indictment herein follows the language of the statute. The statute being sufficiently definite in its terms, such an indictment is good. *State* v. *Odam,* 2 Lea, 220; *Villines* v. *State,* 96 Tenn. 141, 33 S.W. 922; *Griffin* v. *State,* 109 Tenn. 17, 70 S.W. 61. The assignments of error, which challenge the sufficiency of the indictment and the certainty of the act, are accordingly overruled.

It is contended that the statute violates §8 of article 1 of the Tennessee Constitution, and §1 of the 14th Amendment of the Constitution of the United States — the law of the land clause of the state constitution, and the due process of law clause of the federal Constitution, which are practically equivalent in meaning.

We think there is little merit in the contention. The plaintiff in error was a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency

> of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of the state, was in no wise touched by this law.
>
> The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand, it is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not perform. In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of §8 of article 1 of the Tennessee Constitution, nor of the 14th Amendment to the Constitution of the United States. (Emphasis supplied.)

In their attempt to show vagueness, appellees take certain words in the statute out of context and play with them, *e.g.*, the words "teach," and "textbook." They also play with the meaning of the word "evolution." Anyone can take words out of context, play with their meaning, and make any statute seem vague and uncertain. But, this is not the way the law looks at statutes.

In 16 Am. Jur. 2d, Sec. 552, Constitutional Law, Page 951, the principle of law is thus stated:

> "It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first

> essential of due process of law. *On the other hand, where words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. The same holds true as to an order of court.*" (Emphasis added.)

Words must be considered in context, or every statute could be struck down for vagueness.

Finally, we would like to quote more of the Am. Jur. section cited above:

> • • • A statute is not unconstitutionally vague merely because clearer and more precise language might have been used; the Constitution does not require impossible standards of statutory clearity, and does not require more than that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is suspectible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attach for vagueness. Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh.
>
> The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what acts it is his duty to avoid. The constitutional vice in a vague or indefinite statute is the

injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning.

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. But in view of the strong presumptive validity of an act of Congress, statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness than any particular act is disapproved; and *a criminal statute is sufficiently definite of its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command.* (Emphasis added.)

Thus, it is clearly seen that the statutes here involved do not contravene the due process clause of the Fourteenth Amendment to the United States Constitution but are clear, definite, and valid enactments.

II

The Act Does Not Deny Freedom of Speech and Freedom to Learn.

Appellant, a school teacher at Central High School in Little Rock, Arkansas, has challenged the constitutionality of Arkansas Statute §§80-1627, 80-1628 on the grounds

that as a professional teacher her freedom of speech as guaranteed by the Arkansas and United States Constitutions is being curtailed and her rights infringed upon because the statutes prohibit her from teaching in the classroom the doctrine or theory of evolution, better known as Darwinism. Specifically, she alleged that her constitutional freedom of speech is guaranteed to her by the First and Fourteenth Amendments to the Constitution of the United States and by Article II, Section 6, of the Constitution of the State of Arkansas.

The intervenor below, the parent of two students in the School System of high school age, asserted as his basis for attacking the constitutionality of the anti-evolution laws his children's "freedom to learn," a right he claims is incompassed within the guaranty of free speech.

The conduct proscribed by Ark. Stat. Ann. §80-1627 may be best defined by quoting the statute *in toto:*

> §80-1627 — Doctrine of ascent or descent of man from lower order of animals prohibited. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Ark. Stat. Ann. 80-1628 provides the punishment for violation of §80-1627 and imposes upon violators a fine not exceeding $500.00 and vacation by the convicted teacher of the position held in any educational institution or membership on any textbook commission.

The statutes were adopted in 1928; following affirmance by the Supreme Court of the State of Tennessee in 1927 of similar statutes in the renowned case of *Scopes v. State of Tennessee,* 154 Tenn. 106, 289 S.W. 363 (1927). Similar but not identical, the Tennessee anti-evolution law provided that, "It shall be unlawful for any teacher in any of the universities, normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the devine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." The plaintiff in that case was a teacher in a public school of a county in the State of Tennessee, and subject to a teaching contract between himself and the state. The plaintiff denied the story of devine creation of man as taught in the Bible, teaching instead the theory that man had descended from a lower order of animals. He was convicted of violating the Tennessee anti-evolution statute and punished by imposition of the minimum fine of $100.00.

On appeal, the Tennessee Supreme Court held:

> "[Plaintiff] was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of this state, was in no wise touched by this law.

> "The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand, it is an act of the state as a corporation, a proprietor, and employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not perform. In dealing with its own employees engaged in its own work, the state is not hampered by the limitations of §8 of article I of the Tennessee Constitution nor of the Fourteenth Amendment to the Constitution of the United States."

After reviewing numerous cases in which the rule was well settled that a state has the right to regulate the conditions of employment of its servants, the court concluded, *supra*:

> "These cases make it obvious that the State government, as an instant to its power to authorize and enforce contracts for public service, 'may require that they shall be carried out only in a way consistent with its view of public policy, and may punish a departure from that way'."

Thus, the court reasoned that the State, pursuant to this power to regulate the condition of employment of its employees, could lawfully restrict the employees from teaching a subject deemed contrary to the policy of the state.

Dean Leflar in his discussion on *Legal Liability for* the Exercise of Free Speech, 10 Ark. L. Rev. 155 (1956), remarks that while Arkansas does not punish the act of blasphemy as such, he is of the opinion that the same ideological considerations prompted the legislature in Arkansas to pass the present anti-evolution laws. Doctor Leflar takes the position that these laws which relate to

the operation of the public schools, a recognized State function, probably would be sustained. He maintains that their effect is to regulate the work of public employees in their official duties which is an area of conduct outside constitutional guarantees insofar as the State should be permitted to make reasonable rules imposing speech limitations or even silence upon its own employees in the course of their employment. Leflar relies on the rationale of the *Scopes* case for his authority.

In attacking the statutes here involved which prohibit the teaching of the theory or doctrine that mankind ascended or descended from a lower order of animals, Mrs. Epperson argued that they denied her the constitutional right of freedom of speech (R.5). She asked that her employer should be enjoined from interfering with her right to teach or explain evolution (R.7).

She teaches biology in a public school (R.80). She is actually an employee of the State and stands in an employee-employer relationship to the State. She came before the Court and pled in effect, that her *ultimate* employer, the State, cannot tell her what services to perform and what services not to perform.

Her ultimate employer, the State, prohibits her by statute from teaching evolution, commanding her to be silent about this theory or doctrine. This is not an unusual situation. Most employers have certain things about which they command theeir employees to keep silent during their hours of employment; and certainly the State, as an employer, should be entitled to the same rights and privileges to which other employees are entitled.

Mrs. Epperson's liberty, her privilege, her immunity to teach and proclaim the theory of evolution, *elsewhere*

than in the service of the State is not touched by our statute. Only as an employee of the State is she affected thereby. She can teach evolution in a private school or a private forum, but when she is in the service of the State, she must do as the State, her employer, instructs. The State supports the school in which plaintiff teaches, providing her a forum. Taxes pay her salary. This gives the State some authority to determine what the school curriculum shall be.

Mrs. Epperson in the instant case disputes the authority of her ultimate employer, the State, and says that she is going to teach evolution anyway, "notwithstanding the provisions of said statutes" (R.5). In short, instead of arguing that she has a constitutional right of free speech, she should be and is, in reality, arguing that she has a constitutional right to be insubordinate to her employer.

It will be noted that in entering into her contract with the Little Rock School District — a subdivision the State of Arkansas — Mrs. Epperson agreed to the following provision contained in the contract:

> Both parties hereto agree that this contract shall be construed in accordance with all applicable laws and regulations governing the employment, compensation and conduct of teachers (R.39).

Thus, in accepting employment by the Little Rock School District, Mrs. Epperson not only impliedly agreed to subject herself to the conditions of employment demanded by her employer — a subdivision of the State — but she also specifically agreed that her employment should be governed by all applicable laws and regulations governing the conduct of teachers. We submit,

therefore, that she waived any right which she might have had to object to the conditions of employment when she agreed to the provisions of the contract.

There is an Annotation in 53 A. L. R. 832, entitled "Schools: extent of legislative power with respect to attendance and curriculum," which quotes from *People ex rel. Vollmar* v. *Stanley* (1927), 81 Colo. 276, 255 Pac. 610, as follows:

> The powers of the State, the children, and their parents over their education may be briefly but accurately stated thus: (1) state, for its own protection, may require children to be educated. This needs no citation. (2) Certain studies plainly essential to good citizenship must be taught . . . And, as a corollary, such studies may be required of every child. (3) Liberty is more than freedom from imprisonment. . . . The right to conduct a private school, the right of parents to have their children taught where, when, how, what and by whom they may judge best, are among the liberties guaranteed by §1 of the 14th Amendment of the United States Constitution. . . . (4) But these rights are subject to the qualifications (1) and (2) above, and that teachers and places must be reputable *and the things taught not* immoral or *inimical to the public welfare.* . . . (5) *Conversely, the teaching of what is* immoral or *inimical to the public welfare may be forbidden by the state,* even though taught as a moral or religious duty; *e. g.,* polygamy.

The word "inimical" is defined in Webster's New International Dictionary to mean " . . . unfavorable . . . opposed in tendency, influence, or effect; adverse." Certainly, it must be said that the teaching of evolution in the public schools is "*inimical* to the public welfare," *i. e.*, it is " . . . unfavorable . . . opposed in tendency,

influence, or effects; [and] adverse" to the public welfare. Therefore, under the holding of the Court in *People ex rel. Vollmar* v. *Stanley, supra,* as above quoted which holds to the effect that "the teaching of what is . . . inimical to the public welfare may be forbidden by the state" is directly in point and applicable to the case at bar.

The case of *Parker* v. *Board of Education of Prince George County, Maryland,* 237 F. Supp. 222 (1963), aff'd 348 F. 2d 464 (4th Cir. 1965), is also in point. In the *Parker* case, a teacher's contract was not renewed by the School Board and the teacher filed suit in Federal District Court, alleging, *inter alia,* that the Board's action of dismissal denied him the right of free speech guaranteed by the First Amendment to the Constitution of the United States. The Federal District Court held against the teacher, saying:

> The factual allegations contained in the complaint, and in plaintiff's affidavit, show no denial of freedom of speech. It is claimed that plaintiff's contract was terminated because a complaint had been received about his assigning and teaching from the book *Brave New World,* and that the book was thereafter removed from the library. There is no allegation that plaintiff's personal right to free expression was in any way inhibited by the school authorities.
>
> Even if such allegations were present, they would afford no ground for the relief sought in this case. The right of free speech or expression, like other First Amendment guarantees, is not absolute. Where the abridgment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist, *American Communications Ass'n.*

CIO v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed 925 (1950). No unconstitutionality results where the right of free speech is reasonably curtailed as a prerequisite to continued government employment. *Ibid*, at p. 398; *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 95, 67 S. Ct. 556 (1947); Opinion of the Justices, 332 Mass. 785, 127 N.E. 2d 663 (1955).

Ark. Stat. Ann. §80-1628 (Repl. 1960) provides that "Any teacher . . . found guilty of this Act [teaching evolution] . . . upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned . . . "

Therefore, Mrs. Epperson can be dismissed if she teaches evolution. "As a prerequisite to continued government employment," plaintiff must adhere to the requirements of the State Statutes. She stands in the same position in the case at bar as the plaintiff Parker stood in the Federal case above quoted, *i. e.*, neither of them has an absolute right to "free speech," if by this it is meant that they may completely ignore and disregard the wishes of their employer — the State — in the exercise of such right. It does not appear that the Supreme Court of the United States has passed on the precise point presented in the present case, *i. e.*, a state's power to prescribe the curriculum in public schools. It is true that the courts have held unconstitutional certain statutes prohibiting the teaching of foreign languages to students who had not completed a specific grade or course of study; however, we do not believe such decisions are controlling here, for these cases involve private or parochial schools, which the state attempted to include in a broad statute pertaining to all schools. Also, there is nothing "inimical" about the teaching of a foreign language. In the case of *Meyer* v. *State of Nebraska*,

262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, which involved the teaching of a foreign language in a parochial school, the Court said:

> The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. *Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.* (Emphasis added.)

Thus, by dictum, the Court acknowledged that the decision would not have been the same had the statute applied to publicly-supported schools only.

We believe that the case in which the United States Supreme Court upheld the Hatch Act is analogous. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S. Ct. 556 (1947). In that case the Court upheld the right of the United States Government to curtail the free speech of its employees on the basis of the employer-employee relationship, recognizing the fact that this was within the rights of the government as an employer. In defining the issue, the Court said:

> When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel.

Here, plaintiff's right to free expression must be balanced with the State's right to seek orderly management of administrative personnel of the school system and orderly management of the curriculum. The United States Supreme Court, in discussing the Hatch Act, said:

> Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. . . . Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolute.

We submit that neither are Mrs. Epperson's rights absolute, and that the evolution statutes, like the Hatch Act, are valid even though they interfere to some extent with plaintiff's free expression. There must be an orderly management of the curriculum, and the evolution statutes aid in this objective.

Analogous also is *Adler* v. *Board of Education*, 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380, 27 A. L. R. 2d 472 (1952), where the Supreme Court upheld a New York statute which provided that a person who teaches or advocates or who is knowingly a member of an organization which teaches or advocates the overthrow of the government by force or violence shall be disqualified from employment or continued employment in the public school system. In its opinion, the Court said:

> It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *American Communications Asso. C.I.O.* v. *Douds* 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556. They may work for the school system upon the

reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

* * *

. . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. . . .

We wish to emphasize by paraphrasing that Mrs. Epperson may work for the school system upon the reasonable terms laid down by the proper authorities of Arkansas. If she does not choose to work on such terms, she is at liberty to retain her beliefs and associations and go elsewhere for employment. She is not required to work in the Little Rock school system; she is not a victim of involuntary servitude.

A 1961 case from Florida also seems to be in point, wherein a teacher challenged a rule prohibiting university employees from seeking election to public office. The Florida Supreme Court held against his contentions in *Jones* v. *Board of Control*, 131 So. 2d 713 (1961), discussing "academic freedom" in the following language:

> We now proceed to the assault on the rule on the basis of appellant's constitutional claims. It appears to be the position of Professor Jones that the restriction imposed upon college professors prohibiting them from seeking public office encroches on their rights as citizens to run for public office and impinges on their liberty generically described as "academic freedom".
>
> Nowhere in the briefs are we supplied with a definition of the term "academic freedom" or the

outer limits thereof if any are recognized to exist. This apparent shortcoming in the otherwise excellent briefs is quite understandable for the simple reason that in none of the authorities mentioned and in none of the authorities discovered by our own research is the term given any definitive meaning. As contended for by the appellant, however, we understand the expression "academic freedom" to comprehend a claimed privilege of scholars and academicians and teachers generally to teach without restriction either to subject matter or as to limitation on collateral activities. Should we adopt literally the position of the appellant, it appears to us that we would be compelled to concede that a license to teach in a public school system is subject to no regulations whatsoever regarding either the nature of the subject matter to be taught or the time and effort that may be required to be devoted to the classrooms.

We should not lose sight of the fact that Professor Jones is insisting upon continued public employment in a public institution in the face of a violation of a rule apparently in full force and effect when he was engaged for the service and which we must assume that he knew, or should have known, particularly in view of his professional stature as a lawyer and a law professor.

Although we might appropriately do so, we find it unnecessary to approach a solution through the narrow corridor suggested by Justice Holmes in his descriptive dictum that "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N.E. 517. To this end, we do not find it necessary to restrict our perspective to the limited concept, in a measure now outmoded, that a person has no constitutional right to government employment. We think that we can dis-

> pose of our problem on a much broader plateau of reasoning with the view that any right which an individual does have to work for the government or to continue in the public employ or to seek public office must necessarily be subject to all *reasonable* rules and regulations promulgated by the government in the interest of the public and for the well-being of the public services. The appellant claims the right to teach in a State institution pursuant to his contract. The appellee simply replies with the assertion of the power to promulgate *reasonable* regulations of the appellant's conduct of his employment in the interest of the public and particularly the students who depend upon the professor for their instruction. (Emphasis supplied.)

Counsel for appellants stated at the trial that if the teaching of evolution were detrimental to the public welfare, then it should be prohibited in parochial and other private schools the same as in public schools. As we have pointed out elsewhere in this brief, the courts have held that, while the State can regulate what is taught in the public schools, it does not have the same authority with respect to private schools. In other words, the right of individuals and groups to conduct private schools with a minimum of regulation by the State is one of the rights guaranteed under the freedom of speech amendment and one of the purposes and objectives of this amendment. This does not mean, however, that the State is prohibited from exercising any control over the curriculum taught in the State-supported public schools. The courts have held that the right of freedom of speech is not absolute, *i.e.*, the party exercising it must do so with due regard to the rights of others. Our laws prohibiting libel and slander are a curtailment of the right of freedom of speech; nevertheless, they are valid enactments and serve to protect the rights of the public from

the spoken or printed word of an individual who might seek to exercise his freedom of speech to the detriment of others.

In a Federal District Court opinion in 1965, *Bradford* v. *School District No. 21*, 244 F. Supp. 768 (1965), we find the following:

> No individual as a matter of right has a constitutional privilege to be in the public employ as a school teacher; and all teachers in public schools are subject to *reasonable* rules and regulations by state and local school officials. (Emphasis supplied.)

It would seem that the test under which the evolution statutes must be judged is that of reasonableness, *i.e.*, whether they constitute a reasonable restraint on plaintiff's right to free expression.

There is a complete lack of proof by the plaintiff that the challenged statutes have had any adverse, unfavorable, or unreasonable effect upon the school children, their parents, or the community in which they live. On the contrary, Mrs. Epperson and Mr. Blanchard both testified that not a single parent or other interested party had ever complained to either of them of any adverse effect due to the existence of these statutes (R.161, 162, 178). Also, the defendant produced as witnesses before the Court highly reputable and experienced school superintendents and/or administrators who testified under oath that the statutes had had no adverse effect upon the schools at which they were employed in any manner whatsoever (R.116, 168). These school administrators also testified that they had received no complaints from parents or other school patrons to the effect that they felt the theory of evolution should be taught in the schools

(R.164, 167). The plaintiff has wholly failed to prove the unreasonableness of these statutes.

There is a strong presumption that the statutes are valid. As was said in *Berry* v. *Gordon*, 237 Ark. 547, 376 S.W. 2d 279 (1964), "Every presumption must be indulged in favor of the constitutionality of an act of the legislature."

These statutes have been on the books since 1929. They have stood unchallenged for thirty-five years. In 16 C.J.S., Constitutional Law §99, p. 443, it is said: "The presumption in favor of the constitutionality of a statute is especially strong where such constitutionality has long been acquiesced in." A case in point is *McEachin* v. *Martin*, 193 Ark. 787, 102 S.W. 2d 864 (1937), wherein the Arkansas Court said:

> In approaching the decision of this question the well-established rule of construction should be kept in mind that legislation will not be declared unconstitutional unless obviously so, and that all reasonable doubt upon the subject must be resolved in favor of the constitutionality of the legislation.
>
> . . .
>
> The Act of 1903 has now been in effect for thirty-four years, during all of which time its validity has been unquestioned by bench or bar, and while this practice is not conclusive, it is highly persuasive of the validity of section 18. Section 608, chapter on Statutes, 59 C.J. 1023; Lewis' Sutherland on Statutory Construction, vol. 2 (2d Ed.) §477.

Two of our neighboring states have similar statutes: Tennessee (Tenn. Code Ann. §49-1922, enacted 1925)

and Mississippi (Miss. Code Ann. §§6798, 6799, enacted 1926). These two states evidently regard the statutes as being reasonable. The only challenge to either of these was the *Scopes* case, and there the Tennessee statute was held to be valid. The *Scopes decision* was in 1927; since then the evolution statutes have gone unchallenged.

Every state has statutes in regard to its school curriculum; this is an area of legitimate legislative concern. Arkansas has statutes on school subjects other than the evolution statutes. Ark. Stat. Ann. §80-1613 (Repl. 1960) requires that American History be taught; Ark. Stat. Ann. §80-1614 (Repl. 1960) Arkansas History; Ark. Stat. §80-1617 (Repl. 1960), Physical education; Ark. Stat. Ann. §80-1618 (Repl. 1960), the effects of alcohol and narcotics; Ark. Stat. Ann. §80-1620 (Repl. 1960), Conservation. Would appellees also contend that these statutes are invalid?

A school curriculum should not be in a state of chaos. It must be subject to reasonable rules and regulations. To add to or subtract from the designated subject prescribed by law would create an intolerable situation whereby prescribed subject matter would of necessity be shunted aside in favor of some extraneous material that an employed teacher thinks should be substituted, which, as you can see, could easily operate to the detriment of prescribed courses. Mrs. Epperson seeks to substitute her judgment on matters of curriculum for that of the State for the judgment and wishes of a majority of the voters. If she should prevail, there would be no limitation on what any teacher would be permitted to substitute and teach for the prescribed curriculum in the public schools of Arkansas. The State must maintain control over its employees, school teachers, and over the curriculum of its schools.

The Chancellor (later reversed by the Arkansas Supreme Court) below found the Arkansas statute involved to be unconstitutional, relying, it seems, upon *Bartels* v. *Iowa*, 262 U.S. 403, 67 2 ed. 1047 (1923). That case involved a parochial school, not a public school. The case was reversed upon the authority of *Meyer* v. *Nebraska*, 262 U.S. 390, 67 L. ed. 390 (1923) which pointed out that no "challenge [has] been made of the state power to prescribe a curriculum for institutions it supports." The *Bartels* case is just not in point.

We believe that the statutes are a reasonable regulation of the employment of teachers in public schools. They are a reasonable regulation of the curriculum of public schools. Appellants had the burden of showing that they were unreasonable; and appellants have failed to carry that burden.

III

The Act Does Not Deny the Equal Protection of the Law.

Appellants contend for their third point that the statute is void under the equal protection of the law clause of the 14th Amendment to the Constitution of the United States.

Appellants contend that the police power may not be exercised except where there is a clear and present danger to the people of the state or it is exercised for the health, safety and welfare of its people.

On this we disagree. We believe that in the employer-employee relationship such a situation is not required. In the employer-employee cases, what is de-

terminative is not whether there is a "clear and present danger" but whether the rules and regulations are reasonable. The validity of these statutes does not have to depend, however, on the authority of the State to enact them under its police power, since the State clearly has the authority to enact them irrespective of its police power.

Appellants assert that the statutes fall under the equal protection clause because the statutes apply only to the public schools and do not apply to parochial or other private schools.

The error of the appellants, we believe, is that "students" is a broad classification and the classification should be broken down into public, private, and parochial schools.

The "students" attending public schools are not in the "same classification" as students attending the other two types of schools. If there is proper classification, then the statutes do not run afoul of the equal protection clause. 16A C.J.S., Constitutional Law, §505 (b) (2), p. 314. For a case somewhat in point, see *Steele* v. *Sexton*, 234 N.W. 436 (1931), wherein it was held that there was no merit to the contention that a ban on fraternities in public schools discriminated in favor of private schools.

The separate classification of students attending public, parochial, or other private schools is a valid classification. The State has a vital interest in its public schools, and may validly exercise more control over them than over strictly private schools.

IV

The Act Does Not Deny Religious Freedom.

The appellants also claim that they are denied freedom of religion because of the statutes prohibiting the teaching the Darwinian Theory. The purpose of the statute is not necessarily to protect the Christian religion, but we believe that the people of the State of Arkansas have a right to pass such legislation for reasons other than the protection of their religious beliefs. Even if the facts were that the law was enacted to keep theories out of public schools which would contradict the story of the creation of the earth, as set forth in the Christian Bible, it still would not be unconstitutional.

In the case of *Scopes* v. *State, supra,* Mr. Chief Justice Green, speaking for the Tennessee Supreme Court said:

> The last serious criticism made of the act is that it contravenes the provision of §3 of article 1 of the Constitution (of Tennessee), "that no preference shall ever be given, by law, to any religious establishment or mode of worship."
>
> The language quoted is a part of our Bill of Rights, was contained in the first Constitution of the state adopted in 1796, and has been brought down into the present constitution.
>
> At the time of the adoption of our first Constitution, this government had recently been established and the recollection of previous conditions was fresh. England and Scotland maintained state churches as did some of the Colonies, and it was intended by this clause of the Constitution to prevent any such undertaking in Tennessee.

We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know, there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming such a theiry. So far as we knew, the denial or affirmation of such a theiry does not enter into any recognized mode of worship. Since this cause has been pending in this court, we have been favored, in addition to briefs of counsel and various amici curiae, with a multitude of resolutions, addresses and communications from scientific bodies, religious factions, and individuals giving us the benefit of their views upon the theory of evolution. Examination of these contributions indicates that Protestants, Catholics, and Jews are divided among themselves in their beliefs, and that there is no unanimity among the members of any religious establishment as to this subject.

Furthermore, chapter 27 of the Acts of 1925 *requires* the teaching of nothing. It only *forbids* the teaching of the evolution of man from a lower order of animals. . . .

As the law thus stands, while the theory of evolution of man may not be taught in the schools of the state, nothing contrary to that theory is required to be taught. . . .

Our school authorities are therefore quite free to determine how they shall act in this state of the law. Those in charge of the educational affairs of the state are men and women of discernment and culture. If they believe that the teaching of the science of biology has been so hampered by chapter 27 of the Acts of 1925 as to render such an effort no longer desirable, this course of study may be entirely omitted from the curriculum of

> our schools. If this be regarded as a misfortune, it must be charged to the legislature. It should be repeated that the act of 1925 deals with nothing but the evolution of man from a lower order of animals.
>
> It is not necessary now to determine the exact scope of the religious preference clause of the Constitution and other language of that section. The situation does not call for such an attempt. Section 3 of article 1 is binding alike on the legislature and the school authorities. *So far we are clear that the legislature has not crossed these constitutional limitations.* If hereafter the school authorities should go beyond such limits, a case can then be brought to the courts. (Emphasis added.)

The State cannot "establish religion" and neither should it be allowed to disestablish religion. It is more reasonable for the State to prohibit the teaching of evolution in the schools than to allow it to be taught. If prohibited, the non-governmental agencies, *e.g.*, churches and scientific societies than have to debate the issues in non-governmental arenas, not in the public schools. Our evolution statutes help to make the schools of the State of Arkansas neutral in controversial matters concerning science and religion and are an aid in effectuating the separation of church and state.

We call attention to the concurring opinion of Mr. Justice Chambliss in the *Scopes* case, *supra,* wherein, in discussing the Tennessee evolution statute, he said:

> Considering the caption and body of this act as a whole, it is seen to be clearly negative only, not affirmative. It requires nothing to be taught. It prohibits merely. And it prohibits, not the teaching of any theory of evolution, but that theory

(of evolution) only that denies, takes issue with, positively disaffirms, the creation of man by God (as the Bible teaches), and that, instead of being created, he is a product of, springs from, a lower order of animals. No authority is recognized or conferred by the laws of this state for the teaching in the public schools, on the one hand, of the Bible, or of any of its doctrines or dogmas, and this act prohibits the teaching on the other hand of any denial thereof. *It is purely an act of neutrality.* Ceaseless and irreconcilable controversy exists among our citizens and taxpayers, having equal rights, touching matters of religious faith, and *it is within the power of the Legislature to declare that the subject shall be excluded from the tax-supported institutions, that the state shall stand neutral,* rendering "unto Caesar the things which be Saesar's and unto God the things which be God's," *and insuring the completeness of separation of church and state.* (Emphasis added.)

We submit that Initiated Act No. 1 of 1928 is "purely an act of neutrality" and insures the "completeness of separation of church and state."

CONCLUSION

The Supreme Court of Arkansas in its Per Curiam opinion (*State* v. *Epperson*, 242 Ark. 922) held that Initiated Measure #1 of 1928, Ark. Stat. Ann. §80-1627 and §80-1628, was a valid exercise of the state's power to specify the curriculum in its public schools. The Supreme Court of Arkansas expressed no opinion on the question whether the Act prohibits any explanation of the Theory of Evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

We submit that the Supreme Court of Arkansas was correct in its opinion and that its judgment entered thereon should be affirmed.

Respectfully submitted.

JOE PURCELL
Attorney General
State of Arkansas

DON LANGSTON
Assistant Attorney General
State of Arkansas

Justice Building
Little Rock, Arkansas 72201

Attorneys for Appellee

PREME COURT, U. S.

APR 23 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 7

SUSAN EPPERSON and H. H. BLANCHARD, *Appellants*

v.

STATE OF ARKANSAS, *Appellee*

On Appeal From the Supreme Court of Arkansas

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES AND THE NATIONAL SCIENCE TEACHERS ASSOCIATION AS AMICI CURIAE

PHILIP J. HIRSCHKOP
COHEN, HIRSCHKOP & HALL
110 North Royal Street
Alexandria, Virginia 22313
Attorney for the National Education Association of the United States and the National Science Teachers Association

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IN THE

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On Appeal From the Supreme Court of Arkansas

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES AND THE NATIONAL SCIENCE TEACHERS ASSOCIATION AS AMICI CURIAE

STATEMENT OF INTEREST

This brief *amici curiae* is being filed by the National Education Association of the United States (NEA) and the National Science Teachers Association (NSTA) with consent of the parties as provided under Rule 42 of the Rules of this Court.

The National Science Teachers Association, a department of the National Education Association of the United States and an affiliate of the American Association for the Advancement of Science (hereinafter referred to as NSTA), is a non-profit corporation duly organized and existing under and by virtue of the laws of the District of Columbia. It is an independent voluntary organization affiliated as a department of the National Education Association. NSTA is composed of approximately 20,000 members, nearly all of whom teach science and science-related subjects in American elementary schools, junior and senior high schools and colleges and universities. Some sixty-five state, local or regional science teacher organizations are affiliated with NSTA. Over 100,000 high school students annually participate in Future Scientists of America programs carried on by NSTA. The stated objects and purposes of NSTA are:

> To stimulate, improve and coordinate science teaching at all levels of instruction and to engage in any and all activities in furtherance thereof; to promote the improvement of educational systems and processes in the schools in any manner to assist such stimulation and coordination of science teaching; to apprise the general public of possible means of improving science teaching within the schools; and generally to do any and all acts and things which may increase, through education, the knowledge of science devolving upon the general public and the betterment of the general public through such knowledge of science.

The National Education Association of the United States (hereinafter referred to as NEA), is an independent, voluntary, non-governmental organization of educators who live and work throughout the United States. The NEA is related to the teaching profession

of this country somewhat as the American Medical Association is to the medical profession and the American Bar Association is to the legal profession. For over a century, the NEA has been the most representative voice of the teaching profession in America. Its purpose, as chartered by Congress in 1906, remains:

> To elevate the character and advance the interests of the profession of teaching and to promote the cause of popular education in the United States.

The NEA enrolls the majority of teachers of the United States, having a membership, including student teachers, of over one million individual members. Included are teachers, supervisors and administrators, representing all levels of instruction, nursery school through university, from private, public and parochial schools. There are more than eight thousand local, state and territorial education associations affiliated with the NEA.

The interest of the NEA in this case derives from the fact as stated in its platform that:

> The National Education Association exists to advance the cause of education.
>
> Education is the daily practice of great ideals: that every person bears within himself a promise which can and must be realized; that all persons are entitled to respect and dignity; that freedom of thought, of expression, of movement, and of religious belief belongs to all persons; that liberties entail obligations. Education is fundamental to the realization of these ideals.
>
> Education is essential also to the strength and well-being of the society. The public school is the indispensable source of national unity, common

purpose, and equality of opportunity. Educated citizens are the resource through which the society has the power to survive and flourish. . . .

The purpose of the National Education Association is to give effect to these beliefs.

STATEMENT OF THE CASE

The State of Arkansas, in 1928, adopted two statutes, Ark. Stats. Ann., §§ 80-1627 and 80-1628, which in effect made it unlawful for any teacher in any state supported elementary or high school, or university to teach or adopt any textbook which makes reference to the Darwinian Theory of Evolution that mankind ascended or descended from a lower order of animals. The statutes provide:

> *Section 80-1627.* DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
>
> *Section 80-1628.* TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE.—PENALTIES.—POSITIONS TO BE VACATED.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or

adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

Appellant Susan Epperson, a biology teacher in Little Rock Central High School, Little Rock, Arkansas, was furnished the prescribed textbook which contained chapters on the theories of the evolution of man, omitting, however, the Darwinian Theory. Desirous of fulfilling her responsibility as a teacher and properly teaching her subject, but confronted with these 1928 statutes, Miss Epperson, joined later by H. H. Blanchard, a parent of two minor children, who intervened in this action, sought a declaratory judgment in the Chancery Court of Pulaski County, Arkansas, that the Arkansas "anti-evolution" statutes were unconstitutional and in violation of their First and Fourteenth Amendment rights. On May 27, 1966, the Chancery Court held these statutes unconstitutional. (See Appendix A.) This was reversed Per Curiam by the Supreme Court of Arkansas on June 5, 1967. (See Appendix B.)

ARGUMENT

I. ACADEMIC-TEACHING FREEDOM AND THE FREEDOM OF INQUIRY ARE FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS

The state generally has broad police power regarding the establishment and control of its public school system. However, it cannot be disputed but that the exercise of this police power must be reasonable and

not arbitrary, and that it may not infringe upon rights guaranteed by the Constitution and the Bill of Rights.

The Darwinian Theory of evolution is commonly recognized as a fundamental scientific principle. Resting on "a multitude of discoveries of very different kinds, that concur and complement one another," it has therefore been "accepted into man's general body of knowledge by scientists and by other reasonable persons who have familiarized themselves with the evidence." Statement signed by 179 biologists. (See Appendix C.) It is clearly an infringement of academic freedom to deny the teaching of so common and popularly accepted a theory as this.

Academic-teaching freedom and the freedom of inquiry are fundamental rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and must be fully protected. These Arkansas statutes which are neither in furtherance of any legitimate state interest, nor reasonably related thereto, arbitrarily infringe upon the exercise of the aforementioned rights. They cast a pall of orthodoxy over the students and teachers in the classroom and have a chilling effect upon the exercise of fundamental First Amendment rights of open and unrestricted academic inquiry and study. "When academic-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . into this constitutionally protected domain." *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959). The National Science Teachers Association and the National Education Association firmly believe that these Arkansas statutes represent such an intrusion and should be ruled unconstitutional.

Traditionally, school boards, operating on a state and local level, have a great deal of discretion in determining the content of the school curriculum. While it was recognized that the Constitution and the Bill of Rights represented limitations on the state's power in its operation of the school system, the precise extent of such limitations remained for a time, undefined. See *Cumming* v. *Richmond County Board of Education*, 175 U.S. 528, 545 (1899).

One of the major limitations on the state's power, however, was set forth by the Supreme Court in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) wherein a state law which forbad the teaching of any language other than English to any child who had not passed the eighth grade was held unconstitutional. Holding this law violative of the Fourteenth Amendment of the Constitution, the Court stated:

> *The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted.*... Plaintiff in error [a teacher] taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. 262 U.S. at 400 (emphasis added).

Continuing, the Court stated: "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain *fundamental rights* which must be respected." 262 U.S. at 401 (emphasis added). Thus the Supreme Court in 1923 took judicial notice of what was to clearly be recognized in the future as the fundamental rights of academic-teaching freedom and its corollary freedom of inquiry.

Two years later in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) the Supreme Court again entered the field of education and state control, striking down an Oregon statute requiring every parent to send his child, between the ages of eight and sixteen, to a school operated by the state. The Court, in holding this statute unconstitutional and in violation of the due process clause of the Fourteenth Amendment, followed the doctrine laid down in *Meyer* v. *Nebraska, supra,* reaffirming the right of parents to direct the upbringing and education of their children and the right of teachers to teach.

Thereafter, the doctrine of academic freedom and the freedom of inquiry received little judicial notice until 1952, where the Supreme Court in a split decision in *Adler* v. *Board of Education,* 342 U.S. 485 (1952), sustained a New York statute requiring that persons employed in New York public schools or state colleges take an oath of allegiance. Justice Douglas vigorously dissented, objecting to the New York law because of its great potential for stifling intellectual pursuit. Recognizing the need for freedom of thought and inquiry in the academic community and asserting their fundamental character, he noted that the Constitution, "guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher." 342 U.S. at 508.

He further stated, "The public school is in most respects the cradle of our democracy. . . . . [T]he impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship." 342 U.S. at 508. Such a statute, he noted, could have no

other effect than to stifle academic freedom and the exercise of the free intellect, and to frustrate any pursuit of knowledge.

> The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin. . . . A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law. *Adler, supra,* at 510-511 (Douglas J., dissenting).

The following term, in what has become a landmark case in the area of academic freedom, the Supreme Court in *Wieman* v. *Updegraff,* 344 U.S. 183 (1952), unanimously ruled unconstitutional an Oklahoma statute requiring all state employees to take an oath that they had not been members of any subversive organization listed by the Attorney General of the United States. The Court based its decision on the fact that the statute made no distinction between innocent and knowing membership and that under the statute, membership standing alone was sufficient grounds for condemnation. Such a statute was unquestionably violative of the due process clause of the Fourteenth Amendment.

Justice Frankfurter, in a concurring opinion, approached the statute from a different point of view.

Regarding the effect of the Fourteenth Amendment he stated: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling." *Wieman, supra* at 195. In what remains today as one of the most poignant statements on behalf of academic-teaching freedom and the freedom of inquiry, Justice Frankfurther proceeded to define this Constitutional privilege stating:

> But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. 344 U.S. at 195.

Forecasting the effect of such a statute upon the educational process, Justice Frankfurter further noted:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. *It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice* . . . . 344 U.S. at 195 (emphasis added).

Reminiscent of the philosophy of the "market place of ideas" of John Stewart Mill, Justice Oliver Wendell Holmes and others, Justice Frankfurter further explored society's need for academic freedom and the freedom of inquiry. "Public opinion is the ultimate reliance of our society only if it can be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical in-

quiry are required in the formative years of our citizens." 344 U.S. at 196.

This discipline of open-mindedness and critical inquiry, however, can be developed only in an educational environment which pays full respect and tribute to the freedoms of speech, inquiry and association:

> To regard teachers—in our educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. *It is the special task of teachers to foster those habits of open-mindedness and critical inquiry* which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their functions by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. *They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas* . . . . They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedom of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government." *Wieman, supra* at 196-197 (Frankfurter J., concurring) (emphasis added).

Clearly, what was threatened by this Oklahoma statute was not merely the freedom of speech. Academic-teaching freedom and the freedom of inquiry represent separate and distinct rights guaranteed by the First Amendment and any statute threatening to infringe

upon this practice represents a violation of the First Amendment and the due process clause of the Fourteenth Amendment.

In *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957) where a state contempt conviction based on a one-man legislative investigation into subversive activities in New Hampshire was overturned, the Court specifically recognized the existence of academic freedom as a fundamental constitutional right. Emphasizing the fundamental need for academic-teaching freedom and freedom of inquiry, the Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation .... Scholarship cannot flourish in an atmosphere of suspiscion and distrust. *Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*" 354 U.S. 250 (emphasis added).

Responding to the allegation that fear and confusion might be generated by the unorthodox, the Court admonished: "Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." 354 U.S. at 251.

To the State's argument that this one-man investigation was a justifiable exercise of the state's police power, Justice Frankfurther asserted that: "When weighed against the grave harm resulting from *govern-*

mental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lectures appears grossly inadequate," *Sweezy, supra* at 262 (Frankfurter J., concurring) (emphasis added).

In *Barenblatt* v. *United States,* 360 U.S. 109, 112 (1959), where the Court affirmed a contempt conviction of a teacher who refused to testify before a Congressional Committee, Justice Harlan writing for the majority nevertheless stated that:

> When *academic teaching-freedom and its corollary learning-freedom,* so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. (emphasis added).

In the same case Justice Black, dissenting, asserted that one cannot consider the government's demand for self-preservation without recognizing the need in the academic community for experimentation, the exposing of points of view, and the privilege of making mistakes. 360 U.S. at 144-146. Recognizing society's need for an unrestricted forum for the exchange of ideas, he reasoned that:

> . . . the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed; 'Therein lies the security of the Republic, the very foundation of our constitutional government.' 360 U.S. at 145-146.

Quoting from *West Virginia State Board of Ed.* v. *Barnette*, 319 U.S. 624 (1942) he continued:

> *'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.* 360 U.S. at 148 (emphasis added).

The following term the Court, in *Shelton* v. *Tucker*, 364 U.S. 476 (1960), overturned an Arkansas statute which required public school and state college or university personnel to file an affidavit listing all organizations to which they belonged at the time or during the past five years. Reasserting the need for academic-teaching freedom and the freedom of inquiry, the Court stated that: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 364 U.S. at 487. Quoting from *Sweezy, supra*, the Court again recognized that "Teachers and students must always remain free to inquire, to study and to evaluate . . . ." 364 U.S. at 487. And in this area of academic-teaching freedom and the freedom of inquiry, "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 364 U.S. at 489.

In light of such cases as *Wieman, Sweezy* and *Shelton, supra*, it is beyond question but that academic-teaching freedom and the freedom of inquiry are fundamental rights endowed with a constitutional dignity which cannot be denied. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . . ." *Sweezy, supra* at 250. "The vigilant protection of con-

stitutional freedoms is nowhere more vital than in the community of American schools." *Shelton, supra* at 487.

Diffusion of sound learning is vital to the success and progress of any society. Keebler, *Limitations Upon the States' Control of Public Education: A Critical Analysis of State of Tennessee* v. *Scopes*, 6 TENN. L. REV. 153, 175 (1928); Reutters, *The Law and the Curriculum*, 20 LAW & CONTEMP. PROB. 91 (1963) "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 584, 603 (1967). This fact in and of itself would seem to demand that the highest respect be paid to academic-teaching freedom and the freedom of inquiry.

II. THE FREEDOM OF INQUIRY IS A CONSTITUTIONALLY GUARANTEED RIGHT COEXISTING AND INTERTWINED WITH ACADEMIC-TEACHING FREEDOM

Academic freedom has been defined as:

> . . . the liberty and obligation to study, to investigate, to present and interpret, and to discuss facts and ideas concerning man, human society and the physical and biological world in all fields of learning. . . . [It implies] no limitations other than those imposed by generally accepted standards of art, scholarship and science. AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY 5 (1952).

The state of Arkansas would argue that even though academic freedom and the freedom of inquiry may be endowed with the constitutional dignity of a First Amendment right, this factor in and of itself does not render the state educational system immune from rea-

sonable regulation by the state in accordance with its police powers.

In this respect, two factors must be explored. First, it is not the contention of this brief nor is it in issue, that the State has no function in the operation of the educational system. Certainly state control is necessary in the organization and operation of the school system. Unquestionably, reasonable regulation is essential in maintaining discipline on school property and measurably contributes to order and decorum within the educational system. What is, however, in issue is whether the State may exercise unbridled control over what shall be taught in the classroom and whether the State shall have the absolute power to decide what facts, information and issues will be presented to the students, or whether there exists certain constitutional limitations on the exercise of such power.

While absent specific constitutional provisions a state may fail to provide public education, it does not necessarily follow that the state may furnish a system of public education which violates the federal Constitution. "The doctrine of unconstitutional conditions has many applications in our law, and it is enough to dispose of the simple argument based on a state's freedom to avoid undertaking any public education." Sharp, *Science, Religion and the Scopes Case,* 27 CHI. L. REV. 529, 533 (1960). Furthermore, "by placing education under the aegis of its constitution, the State assumed the vital obligation of guaranteeing to all child-citizens the free exercise of their 'largest natural ability.'" Comment, *School Boards, School Books and the Freedom to Learn,* 59 YALE L.J. 928, 946 (1950).

Regarding the state's absolute control over the curriculum, the Supreme Court, on an occasion where it specifically dealt with this problem in *Meyer* v. *Nebraska, supra,* recognized the existence of such limitations when it ruled unconstitutional a state statute prohibiting the teaching of any language other than German to children below the eighth grade.

Confronted with a similar problem, a New York appellate court in *Rosenberg* v. *Board of Education of New York,* 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949), in refusing to grant an injunction seeking to remove certain books from school libraries, recognized the distinct necessity for academic freedom and the freedom of inquiry.

> Except where a book has been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons . . . .
>
> Educational institutions are concerned with the development of free inquiry and learning.

It has been repeatedly pointed out that free inquiry and expression are essential attributes to academic freedom and the freedom of inquiry, and that freedom to learn depends upon "appropriate opportunities and conditions in the classroom. . . ." American Association of University Professors, *Preamble, Statement on the Academic Freedom of Students,* 51 A.A.U.P. Bull. 447 (1965). In this vein, it is clear that academic freedom includes the freedom of inquiry which requires that "all responsible opinions on controversial issues

are voiced and argued—and so do the freedoms of speech and assembly in a democracy." Greene, *The Function of the School in A Modern Democratic Society*; in EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 902, 906 (3d ed. 1967). See also Beale, Are American Teachers Free? (1936) wherein it is stated that "'Teachers should have the privilege of presenting all points of view, including their own, on controversial issues without danger of reprisal by the school administration or by pressure groups in the community." *Id.* at 701.

A more precise understanding of the freedom of inquiry and the students' right to be presented with all responsible points of view on a given issue, may be achieved through an examination of the Court's approach to a problem in an analogous constitutional area. In *Lamont* v. *Postmaster General of the United States*, 381 U.S. 301 (1965), the Supreme Court adjudicated the validity of a federal statute requiring a request in writing as a prerequisite for the forwarding of non-sealed mail from abroad containing propaganda material. In ruling this statute unconstitutional, the Court explored the right of a person to receive such printed material and held that the statute:

> . . . amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment Rights. . . . [It] is at war with the 'unhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan*, 376 US 254, 270; 11 L ed 2d 686, 700; 84 S Ct 710; 95 ALR2d 1421. *Lamont, supra*, at 307.

Justice Brennan, concurring in *Lamont*, pursued at greater length a person's First Amendment right to re-

ceive these publications. His discussion of these rights would seem to be most significant when considering the right of a student to have presented to him popularly accepted academic and scholarly arguments. Noting that the First Amendment contains no specific guarantees of access to publication, he remarks, however, that "the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful." *Lamont, supra* at 308. Citing as authority *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693; *NAACP* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163; *Kent* v. *Dulles*, 357 U.S. 116, 78 S. Ct. 1113 and *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, he continues:

> I think the right to receive publications is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. *It would be a barren marketplace of ideas that had only sellers and no buyers.* 381 U.S. at 308. (Emphasis added).

While it may be argued that the freedom of inquiry involves the risk that a child might, in the midst of such freedom, gravitate toward the "wrong" idea and beliefs, "faith in democracy is predicated on the belief that *greater* benefits accrue from freedom, instead of suppression, of thought." Comment, *School Boards, School Books and the Freedom to Learn*, 59 YALE L. J. 928, 943 (1950) (emphasis added). The student, similarly to one entitled to receive printed matter, must have free access to all thoughts and ideas in order to insure development of a sound intellect and a democratic society.

III. ACADEMIC-TEACHING FREEDOM AND THE FREEDOM OF INQUIRY REQUIRE THE SCHOOL AND THE COMMUNITY TO PRESENT TO THE STUDENT A BALANCED PRESENTATION OF ALL SUBJECTS DISCUSSED IN THE CLASSROOM AND TO INSURE ALL RESPONSIBLE OPINIONS ARE VOICED AND ARGUED

Academic-teaching freedom and the freedom of inquiry are not claimed as luxuries of an academic guild, or as concessions granted by a government. They are professional freedoms, necessary and fundamental conditions to a free society, as are special areas of freedom granted to other professions in order to carry out their duties and properly serve their clients and patients. The elementary and secondary school teacher needs the fundamental freedom of the profession no less than does his colleague in the university or college, or the doctor or lawyer. Mack Iver, Academic Freedom in Our Time 9 (1955). See also Mack Iver, *Academic Freedom and Academic Responsibility*, NEWMAN, THE FREEDOM READER (2d ed. 1958).

In seeking to insure the teacher this academic freedom in the presentation of these ideas, and to insure the student and the community a forum wherein these ideas will be properly presented, Professors Thomas Emerson and David Haber, in an article in the Chicago Law Review, offer a test and guidelines as aids to the legislature, the courts and to society. They note that public education "involves a sector of communication which has many of the elements of a closed system, because of such elements as compulsory attendance laws, the large share of research funds, scholarships and grants, which tend to create a virtual government monopoly. They further note that "the government is assuming an affirmative function in the system of communication through public education." The au-

thors maintain therefore that, "Any such closed, or virtually closed, system of communication creates obvious issues for a democratic society which are not comprehended within the traditional principles of free speech applicable to an open or free-for-all system." Emerson and Haber, *The Scopes Case in Modern Dress*, 27 CHI. L. REV. 522, 526-527 (1960).

Recognizing the power of state and local governments to interfere with these First Amendment freedoms, but that the State does not have unlimited discretion in these areas of academic-teaching freedom and the freedom of inquiry to the exclusion of the mandates of the Constitution and the Bill of Rights, Professors Emerson and Haber suggest a standard which would, if followed, provide for a responsible educational system.

> Essentially the obligation of the government must be to present a fairly balanced exposition of various relevant theories and points of view, and of alternatives open for action. Only through enforcing a concept of this nature can individual members of society develop their full potential or exercise their sovereign right to govern themselves. *Id.*, at 527.

Under such an approach, theories within the area of recognized academic or scientific standards could not be omitted from the curriculum. The teacher would be obligated to present and the student would, as a matter of right, be entitled to be exposed to differing points of views and approaches. Under such an approach, academic-teaching freedom and the freedom of inquiry would serve the community, providing an atmosphere wherein theories and ideas would flourish and the marketplace of ideas would serve the purpose for which it was intended and so carefully protected by the First Amendment.

While it is within the state's authority to establish and control a public school system, any extension of this control into constitutionally protected areas such as academic-teaching freedom and the freedom of inquiry must be closely scrutinized. Any attempt by the state to curtail the presentation of a balanced approach must necessarily be in violation of the due process clause of the Fourteenth Amendment as an unreasonable and arbitrary exercise of its police power. Where the state seeks to abridge fundamental First Amendment freedoms it must bear the burden of proving by clear and convincing evidence the overriding state interest. *Loving* v. *Virginia,* 388 U.S. 1 (1967).

IV. THE ARKANSAS "ANTI-EVOLUTION" STATUTES VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION

If, as the State claims, the Arkansas "anti-evolution" statutes do not represent an arbitrary and capricious exercise of the State's police power, but are, rather, reasonably related to the operation and control of the State's educational system, the obvious conclusion must be drawn that the only realistic function these statutes could possibly have is to isolate the general public and all students from any theory contrary to the Biblical doctrine of the "Divine Creation of Man." Taking a fundamentalist approach to Chapter 1 of the Book of Genesis, ("And God said, Let us make man . . . And the Lord God formed man . . . .") the Darwinian theory of evolution is in fact deemed by some to be contrary to the Bible. Therefore, any consideration of these Arkansas statutes must necessarily lead to the conclusion that they are designed to protect a particular religious doctrine or belief, and are incontrovertibly in violation of the "Establishment" clause of the First Amendment of the Constitution.

As explained by one author and student of these statutes:

> Public obscenity, blasphemy and profanity are made crimes primarily because of their tendency to incur breaches of the peace and disorderly conduct, but not for that reason alone. They are deemed socially objectionable in themselves . . . .
>
> . . . Although Arkansas does not punish blasphemy as such, the same ideological considerations underlie the anti-evolution enactment . . . but it is in fact likely to be a secondary reason, the primary one being a desire to safeguard established moral, social or religious mores against attacks of the sort prohibited. . . . Leflar, *Legal Liability for the Exercise of Free Speech,* 10 ARK. L. REV. 155, 158-159 (1955).

Clearly, the Arkansas legislature has sought to give State support to a particular religious belief, and definitely not to enact a measure dealing with any problem of secular education. Emerson & Haber, *The Scopes Case in Modern Dress,* 27 CHI. L. REV. 522, 523 (1960).

On this matter, the law is clear.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person . . . to profess a belief or disbelief in any religion. *Reynolds* v. *United States,* 98 U.S. 145, 166 (1879); *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Torcaso* v. *Watkins,* 367 U.S. 488 (1961).

The First and Fourteenth Amendments go beyond merely forbidding a national or state church. Their prohibitions extend to any impartial governmental as-

sistance of all religions. *Illinois ex rel McCollum* v. *Board of Education, supra* at 442.

Implicit in these Arkansas anti-evolution statutes is a legislative desire to perpetuate a particular religious doctrine. Such motives, however, cannot sustain these statutes, for "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy to any class, creed, party, or faction." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943). "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine . . . ." *Burstyn* v. *Wilson,* 343 U.S. 495, 505 (1951). The government, State or Federal, may, under no circumstances, use secular institutions to force one or some religion or religious belief on any person. *Zorach* v. *Clauson,* 343 U.S. 306 (1952).

Support for such anti-evolution legislation has, on occasion, been mustered on the grounds that this legislation is necessary to preserve a separation of church and state and an equilibrium in the classroom. It is argued that absent such legislation, the Darwinian theory of evolution representing one point of view regarding the "creation of man" may be offered in the schools, while another point of view, i.e., the "Divine Creation of Man" could not constitutionally be presented, thereby giving State support to a particular religious or atheistic doctrine in contravention to the precepts of the First Amendment. This syllogistic approach, however, has two significant flaws. First, it presupposes that the Darwinian theory of evolution is a religious or atheistic doctrine. Quite the contrary, it is purely a scientific theorum, neither atheistic nor theistic in scope, but merely offering one explanation

for the creation of man in his present form, and not necessarily antithetical to that explanation found in the Bible. The second flaw in the syllogism is that concepts of fairness and a balanced approach to the subject would require the doctrine of the "Divine Creation of Man" to be presented in the schools wherever the Darwinian theory is permitted to be taught. This argument loses sight of the constitutional requirement of separation of church and state. Furthermore, it ignores the fact that undoubtedly the doctrine of the "Divine Creation of Man" will continue to be taught in the home and in the church, thereby, insuring the preservation of the religious counter-argument, but limiting proliferation to its constitutionally proper forum—the church and the home.

Permitting these statutes to stand, therefore, clearly violates the "Establishment" clause of the First Amendment, and sanctions,

> Fraudulent oversimplification and the conceted use of myth or magic [which] serve neither the purpose of science nor the purpose of natural religion. Neither are they consistent with the policy of free and rational discussion which is indispensable for a democracy and implied by Constitutional provisions designed to protect the freedom of speech, [inquiry, or academic-teaching freedom]. Sharp, *Science, Religion and the Scopes Case*, 27 CHI. L. REV. 529, 534 (1960).

CONCLUSION

In a society dedicated to the principle of freedom, the school has the responsibility to teach men how and why to be free.

> The school is, par excellence, the well-spring of these higher freedoms since its special task is to make available man's wisest thoughts and beliefs,

> to extend his knowledge and deepen his spiritual insights, and, above all, to promote in all men the understanding of these highest freedoms and a passionate devotion to them. The school is thus the nurse and tutor, as government is the champion, of man's most precious rights—the rights without which man loses his human stature and becomes an animal, however well-fed, well-organized and well-protected he may be. *Greene, supra* at 905.

Accordingly, if we believe in the freedom of all men, the school must lead the way "by showing what it means to be intelligently and passionately concerned with the freedom of all men everywhere." *Greene, supra* at 907. "The public school is in most respects the cradle of our democracy." *Adler, supra* at 508. (Douglas J., dissenting). In this light, therefore, the Arkansas statutes in issue before this Court, can only be seen as a barrier to the true function and responsibility of education in the United States.

The State of Arkansas has seen fit to invade the system of education and dictate what facts and theories shall and shall not be taught, not only on the elementary and high school levels, but in the universities as well, placing a severe limitation on the classroom as the "market place of ideas." *Keyishian, supra* at 603.

It has ordained, under the guise of its police power and its right to regulate the school systems of the State, that it shall be illegal for one to teach or even to make reference to a fundamental scientific principle. In so doing, the state has imposed a straitjacket upon the intellectual leaders of our community. The State has thereby created a system wherein deadening dogma takes the place of free inquiry. Exercise of the free intellect and the pursuit of knowledge are frustrated

and stifled, and the constitutionally guaranteed right to academic freedom and the freedom of inquiry are mocked at and cast aside.

These statutes have an immediate and irreparable chilling effect upon the historic and traditional right of Americans to free thought and belief and will deter thousands of Americans from exercising these inalienable and indispensable rights. Their ultimate effect must be the placing of severe limitations on the free and unrestricted search for truth, which is the essential precondition for the functioning of a democratic society.

For the foregoing reasons it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

PHILIP J. HIRSCHKOP
COHEN, HIRSCHKOP & HALL
110 North Royal Street
Alexandria, Virginia 22313
Counsel for the National Science Teachers Association and the National Education Association of the United States, as Amici Curiae.

APPENDIX A

Opinion of the Chancery Court of Pulaski County, Arkansas, First Division

No. 131575

SUSAN EPPERSON, *Plaintiff*

v.

W. C. MCDONALD, RUSSELL MATSON, WARREN BASS, JAMES M. COATES, DR. JOHN A. HARRELL and MRS. FRANK GORDON, as Directors of Little Rock School District, and FLOYD PARSONS, as Superintendent of Schools, *Defendants*

HUBERT H. BLANCHARD, JR., *Intervenor*

MEMORANDUM OPINION

This is an action instituted by the plaintiff, as a citizen and resident of Little Rock, Pulaski County, Arkansas, and as a teacher at Little Rock Central High School, employed by the Directors of the Little Rock School District, seeking a declaratory judgment and injunctive relief. Intervenor, Hubert H. Blanchard, Jr., intervened in the action, seeking a declaratory judgment under the terms of the Arkansas Declaratory Judgment Act (Ark. Stats. 34-2501 through 34-2512).

Both the plaintiff and the intervenor allege that Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) is unconstitutional and void because the act contravenes certain provisions of the Constitution of the United States and the Constitution of the State of Arkansas.

Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) reads as follows:

> "80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which

is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals."

"80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOK MENTIONING DOCTRINE—PENALTIES—POSITIONS TO BE VACATED.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (Sec. 80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

Section 4 of Article 14 of the Constitution of the State of Arkansas reads as follows:

"Section 4. SUPERVISION OF SCHOOLS.—The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The First Amendment to the Constitution of the United States reads as follows:

"(RELIGIOUS AND POLITICAL FREEDOM.)—Congress shall make no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

"Sec. 1. (CITIZENSHIP—DUE PROCESS OF LAW —EQUAL PROTECTION.)—All persons born or natualized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Let it be understood at the outset that this Court is not unmindful of the public interest in this case, or of the vital concern of many people in what theories may be taught in the schools, colleges and universities of this state.

The engrossing questions relating to the origin of man, the destiny of man, and the creation of the universe have engaged the thoughts and commanded the attention of the world's greatest philosophers, scientists, theologians, and educators. These questions cannot be answered by the enactment of laws or by the decisions of courts.

In view of the fact that many people have apparently misinterpreted the decisions of the United States Supreme Court regarding the teaching of the Bible in the public schools of our Nation, an explanatory statement seems appropriate. Statements are frequently heard such as "the Bible has been banned from the schools" and "the Bible cannot be taught in the schools". Such statements are not

consistent with the language of the decisions of the Supreme Court. In the recent case of *Abington School District* v. *Schempp*, 374 U.S. 203, 10 L. ed. 2d 844, Mr. Justice Clark, speaking for the Court, made the following statement:

> "In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such a study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."

Judge Clark's opinion speaks for the majority and its language refutes any contention that the Bible or religion may not be taught in the schools nor studied in the schools.

In a concurring opinion in the same case Judge Brennan said:

> "The holding of the Court today plainly does not foreclose the teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not."

This Court does not interpret the decisions of the United States Supreme Court as prohibiting the teaching of the Bible in the public schools. It is not the teaching of the Bible account of the creation of man contained in the Book

of Genesis that is prohibited in the public schools, but it is the conduct of "a religious observation", or, "a religious exercise" which the Supreme Court has said the Constitution prohibits. The Supreme Court has ruled that school boards and officials cannot prescribe and require an official prayer, but this is far from ruling the Bible out of the public schools, statements to the contrary notwithstanding.

Religious practices may be tested or challenged in courts, but religious beliefs or experiences are beyond the competency of courts to prove or disprove. The truth or the fallacy of a scientific theory or doctrine (like a religious doctrine or belief) is not a triable issue in court.

The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether "the theory or doctrine that mankind ascended or descended from a lower order of animals" is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them.

Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. "Teachers and students must always remain free to inquire, to study and to evaluate." *Shelton* v. *Tucker*, 364 U.S. 479, 5 L. ed. 2d 231.

The field of science necessarily involves the discussion and evaluation of *speculative theories*. This has been recognized by the Supreme Court of the United States in the following language:

> "For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.

> Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 1 L. ed. 2d 1311.

In view of the testimony of the plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory that mankind ascended or descended from a lower order of animals, set out in the textbook adopted by the Little Rock School Administration, this Court can find no "exigent and obviously compelling" reason to prohibit a teacher from presenting and explaining the theory along with other theories or doctrines which a student may accept or reject, even though the theory may be objectionable to many of our citizens. By use of the word "teach" the court accepts the common definition "to make aware of by information or to impart the knowledge of". That this is the meaning of the word "teach" intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt "a textbook that *teaches* the doctrine or theory".

This Court has carefully considered the holding in the Scopes case. *Scopes* v. *State of Tennessee*, 154 Tenn. 105, 289 S.W. 363. It seems that the decision in that case was based principally upon the theory that "In dealing with its own employees engaged upon its own work, the State is now hampered by the limitation . . . . of the Fourteenth Amendment to the Constitution of the United States". Counsel for plaintiff and intervenor contend that the Scopes case has been completely overruled while the Attorney General argues that the decision in that case has only been modified. Even if the decision has not been completely overruled by later decisions of the United States Supreme Court, it is the opinion of this Court that the holding in the Scopes case has been modified and made obsolete to

such an extent that it does not apply to the case at bar and that it should not be followed. *Gitlow* v. *New York*, 268 U.S. 652, 69 L. ed. 1138; *Torcaso* v. *Watkins*, 367 U.S. 488, 6 L. ed. 2d 982; *Beilan* v. *Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414.

The Fourteenth Amendment to the United States Constitution encompasses the first ten amendments to the Constitution and the guarantees therein contained. A state may not extinguish the freedoms guaranteed by the Constitution arbitrarily or unreasonably even in the exercise of the police power. Whether a statute is wise or unwise is not for the courts to say, but whether it is reasonable or unreasonable is for the courts to determine. The decision of the United States Supreme Court in the case of *Bartels* v. *Iowa*, 262 U.S. 403, 67 L. ed. 1047, appears to be in point. In that case the state had enacted a statute forbidding the teaching of foreign languages in the public schools. This statute followed the first World War and it was presumed that the German language was not popular with a majority of the citizens of the state. Nevertheless, the United States Supreme Court held that such an act was arbitrary and unreasonable.

This Court is of the opinion that Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be suppressed by the state. If it should be held that the teaching of such a theory does constitute such a hazard, then the statute in question obviously fails to protect the student in a private school from the hazard and thus denies the equal protection of the law.

Many people do not agree with the decision of the United States Supreme Court. Others will agree with them. But it is the duty and responsibility of trial courts to follow the decisions of the Supreme Court even when we may not agree with them, if we are going to maintain our constitutional principles. This Court is not unmindful of the general rule that statutes should not be held constitutional where constitutionality is subject to doubt. In the Court's opinion the unconstitutionality of the statute under consideration is not subject to doubt, irrespective of the motives of those who secured its passage.

Therefore, it is the opinion and ruling of this Court that a decree be entered declaring Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) unconstitutional and void, and that the defendants have no authority to proceed under the act or to enforce the provisions thereof.

No testimony was offered or showing made in this action that the defendants, as Directors and Superintendent of the Little Rock School District, have threatened or have indicated any intention to dismiss plaintiff from her teaching position, or to cancel her contract to teach in the public schools of Little Rock. Counsel for the Directors of the Little Rock School District and the Superintendent of Schools, who are defendants in this case, announced in open court that the School Board and the school officials would follow the decree of this Court. In view of that statement the Court deems it unnecessary to issue an injunction at this time in aid of the declaratory judgment. However, if an effort is made in the future to enforce the statute an injunction would be appropriate.

Counsel for plaintiff and intervenor will prepare a precedent for decree consistent with this opinion and submit the precedent to opposing counsel for approval as to form and then this Court for consideration and signature.

Murray O. Reed, Chancellor

Date: May 27, 1966

DECREE OF THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS,

NO. 131575.

This cause is this day submitted to the Court for its consideration and decree. The plaintiff and intervenor were represented by their attorney, Eugene R. Warren, Esq., the defendants by their attorney, Herschel H. Friday, Jr., Esq., and the State of Arkansas by its attorneys, Honorable Bruce Bennett, Attorney General and Honorable Fletcher Jackson, Assistant Attorney General. The cause was submitted to the Court upon the complaint of the plaintiff, the intervention of the intervenor, the answer of the defendant and the answer of the State of Arkansas, and upon testimony of witnesses for both the plaintiff and the intervenor and the State of Arkansas and documentary evidence, from all of which the Court finds:

1. Initiated Act No. 1 of 1928 (Ark. Stat. 80-1627 and 80-1628) is unconstitutional and void.

2. It is unnecessary that an injunction be issued at this time in aid of this declaratory judgment. The Court should, however, retain jurisdiction of the cause to issue an injunction if any effort is made in the future to enforce said unconstitutional and void statute.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void. The Court retains jurisdiction of this cause to issue such orders as may be necessary in aid of this declaratory judgment. The memorandum opinion heretofore issued by the Court is made a part of this decree. Each party, hereto, shall bear his respective cost herein expended.

MURRAY O. REED, Chancellor

Date: June 16, 1966

APPENDIX B

OPINION OF THE SUPREME COURT OF ARKANSAS

Present: All the Justices

Opinion Per curiam

• • • • •

Supreme Court of Arkansas

No. 5-4127

Opinion Delivered June 5, 1967

Appeal from Pulaski Chancery Court, First Division

Reversed and dismissed

• • • • •

State of Arkansas

v.

Susan Epperson and H. H. Blanchard

• • • • •

Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. Sec. 80-1627 and 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

The decree is reversed and the cause dismissed.

Ward, J., concurs. Brown, J., dissents.

June 5, 1967

FINAL ORDER OF THE SUPREME COURT OF ARKANSAS

Proceedings of a Special Session on Wednesday, July 26, 1967. Court convened pursuant to the call of the Chief Justice.

Present: Carleton Harris, Chief Justice; George Rose Smith; J. Fred Jones; Paul Ward; John A. Fogleman; Conley Byrd.

Absent: Lyle Brown

Court met this day and made the following orders:

Rehearing Petitions Denied. Petitions for rehearing were denied in the following causes:

. . . .

#4127 State of Arkansas v. Susan Epperson, et al.

. . . .

July 26, 1967

APPENDIX C

Is Biological Evolution a Principle of Nature That Has Been Well Established by Science?

It has for many years been well established scientifically that all known forms of life, including man, have come into being by a lengthy process of evolution. It is also known today that very primitive forms of life, ancestors of present-day microbes, arose thousands of millions of years ago. They constituted the trunk of a "tree of life" which in growing branched more and more. That is, some of the later descendants of these earliest living things, passing beyond the level of microbes, became ever more diverse in their kinds, and increasingly different from one another, and some of them came to have a much more complicated organization, that we call more advanced. Man and the other highly organized types of today constitute the present

end-twigs of that tree. The human twig and those of the apes sprang from the same ape-like progenitor twig.

Scientists consider that none of their principles, no matter how firmly established, and no ordinary "facts" of direct observation either, are absolute certainties. Some possibility of human error, even if very slight, always exists. Therefore, instead of there being sharp lines separating "hypothesis," "theory," and "fact," there is a sliding scale of probabilities. Scientists welcome the challenge of further testing of any view whatever. They use such terms as "firmly established only for conclusions founded on rigorous evidence that have continued to withstand searching criticism. The principle of biological evolution, as above depicted, meets these criteria exceptionally well. It rests on a multitude of discoveries of very different kinds, that concur and complement one another. It is therefore "accepted" into man's general body of knowledge by scientists and by other reasonable persons who have familiarized themselves with the evidence.

Among the sources of these different kinds of evidence are the following. (1) Fossil records, now abundantly known, of previously existing life. (2) Careful comparisons of the structure of different living things that are visible to one's naked eye by inspection and dissection of them. (3) Careful comparison of their inner workings, that is, their physiology, including their behavior. (4) Comparisons of their development from the earliest embryos to the oldest adult types. (5) Comparisons of their microscopic and ultra-microscopic structures and of the transformations they can be seen to undergo during the course of living. (6) Comparisons of the details of the complicated chemistry of different living things, an extremely deep and intricate subject nowadays. (7) Studies of the pattern of distribution of different kinds of living things on this earth, both at present and in the past. (8) Studies of how plants now cultivated and animals now domesticated have changed as a result of selection prac-

ticed on them by man, and the elaborate and far-reaching laboratory and field studies in genetics that show how, in the course of generations, separated populations of living things become different from one another in their inherited constitutions.

It would be impossible in a few hours to make clear the significance and the weight of this great mass of extraordinary and intricate findings, to persons not already possessed of a considerable biological background. In fact, even they could hardly grasp them in full without long and deep study, preferably extending over years. Moreover, in recent years the evidence in most of the lines mentioned has accumulated much further. This has resulted in the ever firmer establishment and improved understanding of biological evolution, including the further confirmation of the principle of natural selection that Darwin and Wallace more than a century ago showed to be an essential part of the process of biological evolution. There are no hypotheses, alternative to the principle of evolution with its "tree of life", that any competent biologist of today takes seriously. Moreover, the principle is so important for an understanding of the world we live in and of ourselves that the public in general, including students taking biology in high school, should be made aware of it, and of the fact that it is firmly established even as the rotundity of the earth is firmly established.

May 2, 1966 Signed by 179 biologists.

SIGNERS OF STATEMENT ON EVOLUTION, AS OF JUNE 1, 1966.
POSITIONS AND INSTITUTIONS ARE FOR IDENTIFICATION ONLY
AND NOT AS REPRESENTING THE INSTITUTIONS.

Abrahamson, Seymour,
Assoc. Prof., Zool. Dept.,
Univ. Wis., Madison

Altenburg, Edgar,
Prof. Emeritus, Biol. Dept.,
Rice Univ., Houston

Amadon, Dean,
Amer. Mus. Nat. Hist., N.Y.C.,
Pres. Amer. Ornithol. Union

Arnon, Daniel I.,
Prof., Cell Physiol.,
Chmn. Cell Physiol. Dept.,
Univ. Calif., Berkeley

Atwood, Kimball C.,
Prof., Microbiol. Dept.,
Univ. Ill., Urbana

Auerbach, Robert,
Prof., Zool. Dept.,
Univ. Wis., Madison

Bailey, Joseph R.,
Prof., Zool. Dept.,
Duke Univ., Durham, N. C.

Baker, William K.,
Prof., Zool. Dept.,
Univ. Chicago

Bates, Marston,
Prof., Zool. Dept.,
Univ. Mich., Ann Arbor

Beadle, George,
President,
Univ. Chicago

Beck, Raymond W.,
Assoc. Prof., Microbiol. Dept.,
Univ. Tenn., Knoxville

Beers, C. Dale,
Zool. Dept., Univ., N.C.,
Chapel Hill

Biesele, John J.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Blackler, Antonio W.,
Assoc. Prof., Div. Biol. Sci.,
Cornell Univ., Ithaca

Blair, W. Frank,
Prof., Zool. Dept.,
Univ. Tex., Austin

Bloch, Konrad,
Prof., Chem. Dept.,
Harvard Univ.

Bogert, Charles M.,
Chmn. Herpetology Dept.,
Amer. Mus. Nat. Hist., N.Y.C.

Bonner, J. T.,
Prof., Chmn. Biol. Div.,
Princeton Univ.

Boyden, Alan,
Prof. Emeritus, Zool. Dept.,
Rutgers Univ.,
New Brunswick, N. J.

Breland, Osmond P.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Brink, R. Alexander,
Prof., Genetics Dept.,
Univ. Wis., Madison

Brown, Spencer W.,
Prof., Genetics Dept.,
Univ. Calif., Berkeley

Bryson, Vernon,
Prof., Inst. Microbiol.,
Rutgers Univ.,
New Brunswick, N. J.

Bucklin, Donald H.,
Prof., Zool. Dept.,
Univ. Wis., Madison

Butler, E. G.,
H. F. Osborn Prof.,
Biol. Div.,
Princeton, Univ.

Calder, William A.,
NSF Fellow, Zool. Dept.,
Duke Univ., Durham, N. C.

Cameron, D. R.,
Prof., Genetics Dept.,
Univ. Calif., Berkeley

Carlson, Elof A.,
Assoc. Prof., Zool. Dept.,
Univ. Calif., Los Angeles

Carlson, J. Gordon,
Head, Zool. Dept.,
Univ. Tenn., Knoxville

Carson, Hampton L.,
Prof., Zool. Dept.,
Washington Univ., St. Louis

Carver, James E., Jr.,
Post-Doct. Research Fellow,
Amherst Coll., Mass.

Coe, Edward H., Jr.,
Prof., Dept. Field Crops,
Univ. Missouri, Columbia

Colbert, Edwin H.,
Prof., Columbia Univ.,
Curator Amer. Mus. Nat. Hist.,
N.Y.C.

Cole, Arthur C.,
Prof., Entomol. Dept.,
Univ. Tenn., Knoxville

Cole, Lamont C., Prof.,
Chmn. Ecol. & Systematics Sect.
Div. Biol. Sci's.,
Cornell Univ., Ithaca

Cook, Robert C.,
Ed. Emeritus "Journal of
Heredity"; Ed. & Pres.,
Population Reference Bu., Inc.,
Washington, D. C.

Cooper, Kenneth W.,
Prof., Cytol. & Genetics Dept.,
Dartmouth Med. School,
Hanover, N. H.

Crow, James F.,
Prof. & Chmn., Genetics Dept.,
Univ. Wis., Madison

Davis, A. N.,
Zool. Dept., Duke Univ.,
Durham, N. C.

Davis, Donald M.,
NASA Fellow, Zool. Dept.,
Duke Univ., Durham, N. C.

Davis, Doris A.,
Instr., Biol. Dept.,
N. C. Coll., Durham

Delbruck, Max,
Prof., Biol. Div.,
Cal. Tech., Pasadena

Dempster, Everett R.,
Chmn., Genetics Dept.,
Univ. Calif., Berkeley

Dillon, John R.,
NASA Fellow, Zool. Dept.,
Duke Univ., Durham, N. C.

Doty, Paul
Prof., Chemistry Dept.,
Harvard Univ.

Edgar, Robert S.,
Assoc. Prof., Biol. Div.,
Cal. Tech., Pasadena

Ehrlich, Paul R.,
Assoc. Prof., Biol. Dept.,
Stanford Univ., Calif.

Emerson, Alfred E.,
Prof. Emeritus, Zool. Dept.,
Univ. Chicago

Emlen, John L.,
Prof., Zool. Dept.,
Univ. Wis., Madison

Engels, William L.,
Zool. Dept., Univ. N. C.,
Chapel Hill

Faber, Lee E.,
Research Asst., Biol. Dept.,
Bowling Green State Univ.,
Ohio

Forrest, Hugh S.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Fox, Allen S.,
Prof., Genetics Dept.,
Univ. Wis., Madison

Fraser, Lemuel A.,
Prof. & Chmn., Zool. Dept.,
Univ. Wis., Madison

Fraser, Ronald C.,
Prof., Zool. Dept.,
Univ. Tenn., Knoxville

Fustrom, James W.,
Asst. Prof., Genetics Dept.,
Univ. Calif., Berkeley

Giese, Arthur C.,
Prof., Biol. Dept.,
Stanford Univ., Calif.

Gilbert, Barrie K.,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Glass, Bentley,
Disting. Prof., Biol. Dept.
& Acad. Vice Pres.,
State Univ. of N. Y.,
Stoney Brook, L.I.

Granick, Sam,
Prof. & Member,
Rockefeller Univ., N.Y.C.

Green, Earl L.,
Spr. Staff Scientist &
Director, Jackson Lab.,
Bar Harbor, Me.

Grobman, Arnold B.,
Dean, Coll. Arts & Sci's.,
N. J. State Univ.,
New Brunswick

Hagen, Charles W., Jr.,
Assoc. Dean, Coll. Arts & Sci's.,
Ind. Univ., Bloomington

Hagaedorn, R.,
Asst. Prof.,
Univ. N. C., Chapel Hill

Halil, J. J.,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Hamilton, Terrell H.,
Asst. Prof., Zool. Dept.,
Univ. Tex., Austin

Hardin, Garrett,
Prof., Biol. Dept.,
Univ. Calif., Santa Barbara

Harreveld, A. van,
Prof., Psychol. Dept.,
Cal. Tech., Pasadena

Hartman, Philip E.,
Prof., Biol. Dept.,
Johns Hopkins Univ.,
Baltimore, Md.

Hasler, A. D.,
Prof., Zool. Dept.,
Univ. Wis., Madison

Heston, W. E. (Ph.D., LL.D.),
Chief, Biol. Lab.,
Natl. Cancer Inst.,
Bethesda, Md.
& Ruling Elder Presbyterian
Church, U. S.

Hexter, William M.,
Assoc. Prof., Biol. Dept.,
Amherst Coll., Mass.

Hoehman, Benjamin,
Assoc. Prof., Zool. Dept.,
& Geneticist,
Univ. Tenn., Knoxville

Holm, Richard W.,
Prof. of Biol. Sci's.,
Stanford Univ., Calif.

Holtman, D. Frank,
Head, Microbiol. Dept.,
Univ. Tenn., Knoxville

Horowitz, N. H.,
Prof., Biol. Div.,
Cal. Tech., Pasadena

Hotton, Nicholas, III,
Assoc. Curator, Fossil
Amphibians & Reptiles,
Vertebrate Paleontology Div.,
Smithsonian Institution,
U. S. Nat'l Mus., Washington

Howell, J. C.,
Assoc. Prof., Zool. Dept.,
Univ. Tenn., Knoxville

Howells, W. W.,
Prof., Anthropol. Dept.,
Harvard Univ.

Hoyer, Bill H.,
Head, Biochem. & Biophys.
Sect., Biol. of Viruses Lab.,
Natl. Inst. of Allergy &
Infectious Diseases,
Natl. Inst. Health,
Bethesda, Md.

Hubbs, Carl L.,
Prof. Emeritus, Biol. Dept.,
Univ. Calif., San Diego

Ives, Philip T.,
Research Assoc.,
Amherst, Coll., Mass.

James, Charles E.,
Zool. Dept.,
Univ. N. C., Chapel Hill

Janner, James T.,
Assoc. Prof., Entomol. Dept.,
Univ. Tenn., Knoxville

Jepsen, Glenn L.,
Sinclair Prof.,
Vertebrate Paleontology Dept.,
Princeton Univ.

Jones, Arthur M.,
Prof., Zool. Dept.,
Univ. Tenn., Knoxville

Judd, Burke H.,
Assoc. Prof., Zool. Dept.,
Univ. Tex., Austin

Kendall, Robert L.,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Kennedy, Donald,
Prof., Biol. Dept.,
Stanford Univ., Calif.

Kimball, R. F.,
Sr. Biologist, Oak Ridge
Natl. Lab., Tenn.

Kircher, Ann B.,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Klopfer, Peter H.,
Assoc. Prof., Zool. Dept.,
Duke Univ., Durham, N. C.

Lambe, Catherine Underhill,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Laughnan, John R.,
Prof., Botany & Plant,
Genetics Depts.,
Univ. Ill., Urbana

Lerner, I. Michael,
Prof., Genetics Dept.,
Univ. Calif., Berkeley

Lewis, E. B.,
Prof., Biol. Div.,
Cal. Tech., Pasadena

Lewis, Harlan,
Dean, Life Sci's Div.,
Univ. Calif., Los Angeles

Libby, William J.,
Asst. Prof. & Adviser,
Genetics Dept.,
Univ. Calif., Berkeley

Liles, James N.,
Assoc. Prof., Entomol. Dept.,
Univ. Tenn., Knoxville

McElroy, William D.,
Prof., Chmn. Biol. Dept., &
Director, McCollum-Pratt Inst.,
Johns Hopkins Univ.,
Baltimore, Md.

McFarland, William N.,
Assoc. Prof., Biol. Sci's. Div.,
Cornell Univ., Ithaca

McKean, Hanley E.,
Visiting Assoc. Prof.,
Genetics Dept.,
Univ. Calif., Berkeley

McShan, W. H.,
Prof. of Zoochemistry,
Zool. Dept.,
Univ. Wis., Madison

Meyer, Helen U.,
Project Asst., Med.,
Genetics & Zool. Depts.
Univ. Wis., Madison

Merrell, David J.,
Prof., Genetics Dept.,
Univ. Minn., Minneapolis

Muller, Herman J.,
Prof. Emeritus, Zool. Dept.,
Ind. Univ., Bloomington

Myers, Jack,
Prof., Zool. Dept.,
Univ. Tex., Austin

Neuffer, M. G.,
Assoc. Prof., Field Crops Dept.,
Univ. Mo., Columbia

Nicklas, R. B.,
Assoc. Prof., Zool. Dept.,
Duke Univ., Durham, N. C.

Noland, Lowell E.,
Prof., Zool. Dept.,
Univ. Wis., Madison

Novitski, E., Prof.,
Head, Biol. Dept.,
Univ. Ore., Eugene

Oliver, Clarence P.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Olson, Everett C.,
Prof., Geophysical Sci. Dept.,
Univ. Chicago

Osgood, David W.,
Teaching Asst., Zool. Dept.,
Duke Univ., Durham, N. C.

Oster, Irwin I.,
Prof., Biol. Dept., Bowling
Green State Univ., Ohio

Owen, H. Malcolm,
Head, Biol. Dept.,
Univ. of the South,
Sewanee, Tenn.

Owen, Ray D., Prof.,
Cal. Tech., Pasadena

Perkins, David D.,
Prof., Biol. Dept.,
Stanford Univ., Calif.

Pincus, Gregory,
Worcester F'nd'n
for Exper. Biol.,
Shrewsbury, Mass.

Pipkin, Sarah Bodichek,
Biol. Dept., Johns Hopkins
Univ., Baltimore, Md.

Pittendrigh, Colin S.,
Prof., Biol. Dept., &
Dean, Grad. School,
Princeton Univ.

Plough, Harold H.,
Prof. Emeritus, Biol. Dept.,
Amherst Coll., Mass.

Powers, E. C.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Preer, John R., Jr.,
Prof., Zool. Dept.,
Univ. Penna., Philadelphia

Raven, Peter H.,
Asst. Prof., Biol. Dept.,
Stanford Univ., Calif.

Reed, Sheldon C.,
Prof., Genetics Dept.,
Director, Dight Inst. for
Human Genetics,
Univ. Minn., Minneapolis

Riddle, Oscar, Ph.D., LL.D.,
D.H.C., Retired Memb.,
Carnegie Inst. of Wash.

Riggs, Austin,
Prof., Zool. Dept.,
Univ. Tex., Austin

Riley, Herbert P.,
Prof., Botany Dept.,
Univ. Ky., Lexington

Rollins, Reed C.,
Asa Gray Prof. of
Systematic Botany,
Harvard Univ.

Roman, Herschel L.,
Prof. & Chmn., Genetics Dept.,
Univ. Wash., Seattle

Romer, Alfred,
Prof. Emeritus, Zool. Dept.,
Harvard Univ.

Ross, S. Meryl,
Prof., School of Med.,
Tulane Univ., New Orleans
& Fellow, Nat. Inst. Health

Ross, Herbert H.,
Prof., Entomol. Dept.,
Univ. Ill., & Principal Scientist
& Asst. Chief, Ill. Natural
Hist. Survey, Urbana

Rowe, Gilbert I., II,
N.D.E.A. Fellow, Zool. Dept.,
Duke Univ., Durham, N. C.

Sagan, Carl,
Asst. Prof., Astronomy Dept.,
Harvard Univ., & Staff
Memb. Smithsonian Instn.

Schrank, A. R., Prof.,
& Chmn., Zool. Dept.,
Univ. Tex., Austin

Scott, John Paul,
Research Prof., Biol. Dept.,
Bowling Green State Univ.,
Ohio

Sears, E. R.,
Prof., Field Crops Dept.;
Research Geneticist,
U. S. Dept. Agric.,
Univ. Mo., Columbia

Selander, Robert K.,
Assoc. Prof., Zool. Dept.,
Univ. Tex., Austin

Shirley, Emily,
Grad. Stud., Physiol. Dept.,
Duke Univ., Durham, N. C.

Simpson, George Gaylord,
Harvard Univ.

Singleton, W. Ralph,
Miller Prof., Biol. & Agric.,
Univ. Va., Charlottesville

Snyder, Laurence H.,
President Emeritus, Univ.
Hawaii, Honolulu, & Past
Pres., Am. Assoc. Adv. Sci.

Sokoloff, Alexander,
Research Geneticist,
Univ. Calif., Berkeley & Assoc.
Prof., Biol. Dept., Calif. State
Coll., San Bernardino

Soltau, Susan Kae,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Sonneborn, Tracy M.,
Dist. Serv. Prof., Zool. Dept.,
Ind. Univ., Bloomington

Spiegelman, S.,
Prof., Microbiol. Dept.,
Univ. Ill., Urbana

Spiess, Eliot B.,
Prof., Biol. Dept.,
Univ. Pittsburgh

Spuhler, J. H., Prof., &
Chmn., Anthropol. Dept.,
Univ. Mich., Ann Arbor

Stalker, Harrison D.,
Prof., Zool. Dept.,
Wash. Univ., St. Louis

Standaert, Thomas A.,
Grad. Stud., Zool. Dept.,
Duke Univ., Durham, N. C.

Stebbins, G. Ledyard,
Prof., Genetics Dept.,
Univ. Calif., Davis

Stern, Curt,
Prof., Zool. Dept.,
Univ. Calif., Berkeley

Stone, Wilson S.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Suskind, Sigmund R.,
Prof., Biol. Dept.,
Johns Hopkins Univ.,
Baltimore, Md.

Swanson, Carl P.,
Wm. D. Gill Prof., Biol. Dept.,
Johns Hopkins Univ.
Baltimore, Md.

Swinheimer, Robert L.,
Prof. of Biophysics,
Cal. Tech., Pasadena

Tipton, Samuel R.,
Prof., Zool. Dept.,
Univ. Tenn., Knoxville

Tyler, Albert,
Prof., Biol. Div.,
Cal. Tech., Pasadena

Ursprung, Heinrich,
Assoc. Prof., Biol. Dept.,
Johns Hopkins Univ.,
Baltimore, Md.

Vinograd, Jerome,
Prof. of Biol. & Chem.,
Cal. Tech., Pasadena

Visscher, Maurice B.,
Prof., Physiol. Dept.,
Univ. Minn., Minneapolis

Wagner, R. P.,
Prof., Zool. Dept., &
Director Genetics F'nd'n,
Univ. Tex., Austin

Wald, George,
Prof., Biol. Dept.,
Harvard Univ.

Wallis, Elizabeth T.,
Research Asst., Biol. Dept.,
Bowling Green State Univ.,
Ohio

Washburn, S. L.,
Prof., Anthrop. Dept., &
Director, Primate Behavior
Project, Univ. Calif., Berkeley

Whaley, W. Gordon, Prof.,
Director, Cell Research Inst.,
Univ. Tex., Austin

Wheeler, Marshall R.,
Prof., Zool. Dept.,
Univ. Tex., Austin

Whiting, P. W.,
Prof. Emeritus, Zool. Dept.,
Univ. Penna., & Consultant,
Oak Ridge Nat'l. Lab., Tenn.

Whittinghill, Maurice,
Prof., Zool. Dept.,
Univ. N. C., Chapel Hill

Wood, Albert E.,
Prof., Biol. Dept.,
Amherst Coll., Mass.

Wolff, Sheldon,
Prof. Cytogenetics
Univ. Calif. Med. Center,
San Francisco

Yanofsky, Charles,
Prof., Biol. Dept.,
Stanford Univ. Calif.

Yost, Henry,
Prof., Biol. Dept.,
Amherst Coll., Mass.

Young, Frank N.,
Prof., Zool. Dept.,
Ind. Univ., Bloomington

Zirkle, Conway,
Prof., Botany Dept.,
Univ. Penna., Philadelphia

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted]7

SUSAN EPPERSON and H. H. BLANCHARD,
Appellants,

v.

STATE OF ARKANSAS,
Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN JEWISH CONGRESS, AS *AMICI CURIAE*

LEO PFEFFER
MELVIN L. WULF
Attorneys for
American Civil Liberties Union
191 Willoughby Street
Brooklyn, New York 11201

HOWARD M. SQUADRON
JOSEPH B. ROBISON
Attorneys for American Jewish Congress
15 East 84th Street
New York, New York 10028

LEO PFEFFER
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1967

No. 749

SUSAN EPPERSON and H. H. BLANCHARD,
Appellants,

v.

STATE OF ARKANSAS,
Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN JEWISH CONGRESS, AS *AMICI CURIAE*

Statement of the Case

This brief is submitted by consent of the parties.

This is a suit by a public high school science teacher and a parent of children attending public schools in Arkansas for judgment declaring the unconstitutionality of a state statute (Ark. Stats. Ann. Secs. 80-1627 and 80-1628) making it a penal offense to teach in any tax-supported school "the theory or doctrine that mankind ascended or descended from a lower order of animals" or to use a textbook containing such teaching. The lower

court (Chancery Court of Pulaski County) upheld the appellants' contentions and issued a decision declaring the statute unconstitutional, but the Supreme Court of Arkansas reversed and held the statute to be "a valid exercise of the state's power to specify the curriculum in its public schools." Thereafter this Court noted probable jurisdiction of the appellants' appeal.

Interest of the *Amici*

The American Civil Liberties Union is a private, nonpartisan organization, engaged solely in defense of the Bill of Rights. It joins in this brief *amicus curiae* because it believes that the Arkansas prohibition against the teaching of evolution in the public schools is essentially an abridgment of the First Amendment and of academic freedom. The Union, having been intimately associated with *Scopes* v. *Tennessee* 40 years ago, when this issue first arose in the courts, looks forward to its final resolution in this case.

The American Jewish Congress is a national organization of American Jews founded in 1918 and committed by its constitution to the dual and inseparable purposes of defending and extending American democracy and preserving our Jewish heritage and its values. We join in this brief because we believe the statute in question infringes upon the guarantees of free speech, religious liberty and separation of church and state, secured by the First Amendment.

Statutory Provision Involved

Ark. Stats. Ann. Secs. 80-1627 and 80-1628 provide as follows:

> SECTION 80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
>
> SECTION 80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE.—PENALTIES.—POSITIONS TO BE VACATED.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

Question to Which this Brief is Addressed

Does the Arkansas statute violate the Fourteenth Amendment of the Federal Constitution either through the direct operation of the Due Process Clause or through the Amendment's rendering applicable to the states the First Amendment's prohibition of laws respecting an establishment of religion or abridging freedom of speech?

Summary of Argument

I. The Supreme Court of Arkansas was in error in assuming an unlimited power in the state to specify the content of subjects which are part of the public school curriculum. Like all other powers, this too must be exercised within the limits of the constitutional requirement of due process of law. That provision of the Constitution bars arbitrary action by government even in the exercise of its proprietory functions. A law making it a penal offense for a teacher to perform his duties in accordance with accepted professional standards violates the Due Process Clause, at least in the absence of any countervailing state interest.

II. A court's power judicially to note historical facts enables this Court to find that the purpose of the Arkansas statute was to forbid teaching deemed to be inconsistent with a literal interpretation of the Biblical account of the creation of man. This certainly is the primary if not sole effect of the law. As such it is a law respecting an establishment of religion in violation of the First Amendment.

III. Freedom to teach and freedom to learn are both protected by the free speech guaranty of the First Amendment. These freedoms may not be restricted in the absence of convincing evidence that restriction is necessary to prevent a clear, imminent and serious injury to the community. Such evidence is patently lacking in the present case.

ARGUMENT

POINT I

The Arkansas statute is an arbitrary exercise of state power in violation of the Due Process Clause of the Fourteenth Amendment.

The cryptic opinion of the Arkansas Supreme Court states only that a statute making it a crime for a public school teacher to teach "the theory or doctrine" of evolution is a "valid exercise of the state's power to specify the curriculum in the public schools." While this can perhaps be interpreted to mean that other exercises of the power to specify curriculum may be invalid, the present one is valid. But no reason is given by the court for distinguishing the present exercise of the power from others, and the most reasonable interpretation of the decision is that the statute is valid because the state has the power to specify the curriculum in its own schools, at least in the absence of a specific constitutional prohibition, such as that against teaching religious dogma or prayers. *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Engel* v. *Vitale,* 370 U. S. 421 (1962).

We seek to establish in our second point that the Establishment Clause of the First Amendment does indeed forbid a prohibition of the teaching of the theory of evolution as it forbids the teaching of religious dogma or prayers. It is true that, as this Court pointed out in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943), "it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake," and that the "test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved." Nevertheless, the Due Process Clause does have a vitality of its own and does serve a substantive function broader than that of transmitting the First Amendment to the states. While this does not empower the Court to "sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions" (*Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965)), it does, we submit, forbid arbitrary governmental interference with academic integrity. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Farrington* v. *Tokushige,* 273 U. S. 284 (1927). Academic freedom and professional integrity are higher values in our democracy than economic *laissez-faire,* and as to these, as in the case of marital privacy, the Due Process Clause of the Fourteenth Amendment serves a function in relation to the states analogous to the Ninth Amendment in relation to the Federal government.

The Arkansas Supreme Court framed the issue in this case in the terms of the power of a state to specify the curriculum in its public schools. It resolved the issue by holding in effect that this power is constitutionally unlimited. This is by no means so. In *West Virginia State Board of Education* v. *Barnette, supra,* this Court held that a state could not constitutionally prescribe a curriculum which included compulsory flag-saluting. In *McCollum* v. *Board of Education, supra,* a similar ruling was made in respect to religious instruction and, in *Engel* v. *Vitale, supra,* and *Abington School Board* v. *Schempp,* 374 U. S. 203 (1963), in respect to prayer recitation and Bible reading.

In *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954), the Court held racial segregation in the public schools to be unconstitutional because it "generates a feeling of inferiority" in the Negro children. Suppose a state integrated its public schools but prescribed a course in the racial inferiority of Negro children. Can it be doubted that this prescription by the state of its own curriculum would be held invalid under the Fourteenth Amendment?

Actually what is in issue here is not the power of the state to prescribe the curriculum in its public schools. The question in this case is not whether the State of Arkansas can prescribe a public school curriculum which does not include a course in biology or even in science. The question is whether the state may in all circumstances prescribe a content for a course which violates universal educational standards for the teaching of the course.

Indeed, the question is even narrower than that. Ordinarily, the content and method of teaching a course is left by the state in the hands of the professional educators, where it properly belongs. (This, Arkansas, like all other states, seems to have done with respect to every course and course-content except evolution.) If a teacher does not follow prescribed curriculum or course content he may be called to account by his educational superior, and if he persists may be discharged. The Arkansas statute provides criminal sanctions for the offense. This smacks more of punishment for heresy than regulation of curriculum.

It is no answer to say that, since the state owns the public schools, it can run them in any way it wants. Even a private owner of property may be subject to constitutional limitations in the manner in which he operates it. *Marsh* v. *Alabama*, 326 U. S. 501 (1946). But even if that were not so, and if in all cases a nongovernmental owner of property is subject to no constitutional restraints in what he does with his property, the time is long past when it could be validly argued that government acting in its proprietary capacity enjoys the same freedom to act arbitrarily as does a private owner. We are long past the day when the Court could say, as it did in *Davis* v. *Massachusetts*, 167 U. S. 43, 47 (1897): "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." See *Hague* v. *C.I.O.*, 307 U. S. 496 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

A private person may bar an obnoxious preacher from his parlor, but a state cannot constitutionally bar him from its parks. *Kunz* v. *New York,* 340 U. S. 290 (1951). A private employer may refuse to hire an atheist or a member of the Communist party, but a state may not. *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967).

More closely related to the present case, a state may require military training as a compulsory course in a state university not because the state has judicially unreviewable discretion in specifying the curriculum in its public schools but because, by reason of its vital interest in national defense, the discretion cannot be said to be arbitrary. *Hamilton* v. *Regents of University of California,* 293 U. S. 245 (1934). *Cf. In re Summers,* 325 U. S. 561 (1945). On the other hand, a state may not exercise its power to prescribe the curriculum in public schools so as to require children to salute and pledge allegiance to the flag because it has no interest sufficiently weighty to justify the action. *West Virginia State Board of Education* v. *Barnette, supra.*

The crux of the matter is that the Due Process Clause forbids arbitrary exercise of governmental power even in the performance of proprietary functions. It is true that where only economic interests are affected the Court will respect the judgment of the legislature except in extreme cases of patent irrationality. But, as we have indicated, where interests more precious than monetary ones are threatened, a more strict judicial scrutiny will be imposed. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, fn. 4 (1937).

In *Meyer* v. *Nebraska, supra,* this Court passed on the constitutionality of a state statute which, like the present one, sought to regulate curriculum content through the criminal law. It provided that "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school teach any subject to any person in any language other than the English language." It also provided that "Languages, other than the English language, may be taught as languages only after a pupil has attained and successfully passed the eighth grade * * *" Violation of the law constituted a misdemeanor. It is important to note that this case was decided before the Court held the First Amendment applicable to the states, either in its free speech or freedom of religion aspects. *Gitlow* v. *New York,* 268 U. S. 652 (1925); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). Nevertheless, the Court held that statute unconstitutional, saying (236 U. S. at 390):

> The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall * * * deprive any person of life, liberty or property, without due process of law."
>
> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

> privileges long recognized at common law as essential to the orderly pursuit of happiness by free men * * * *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.* Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts * * * (Emphasis added. Citations omitted.)

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), this Court reiterated this principle and again held that the Due Process Clause forbids state action which is arbitrary in that it "has no reasonable relation to some purpose within the competency of the state." Like *Meyer* v. *Nebraska, supra, Pierce* was not based on freedom of religion, as is evident from the fact that the same opinion encompassed the companion case of *Pierce* v. *Hill Military Academy*, which involved a purely secular school.

Measured by this test, we submit, the Arkansas statute cannot stand. It is arbitrary and therefore violative of the Fourteenth Amendment because it has no reasonable relation to any purpose within the competency of the state to effect. The sole purpose of a statute making it a penal offense to tell children that there is a theory (not necessarily an established doctrine—the Arkansas statute speaks in the alternative) that man ascended or descended from a lower order of animals is to protect a particular sectarian faith from the danger of secular, scientific inquisitiveness. As we suggest in our next point, such a statute

is a religious law forbidden by the Establishment Clause of the First Amendment. Here we suggest that, independent of that ground, the purpose is not within the competency of the state to effect, and that accordingly the law is arbitrary and wanting in due process.

POINT II

The Arkansas law is a religious law and hence violative of the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth.

Initially we point out that this case does not present a question of the freedom of religion of those children and their parents whose faith precludes learning about the theory of evolution, even as a theory. That question would be present if children were compelled to participate in or even be present during the teaching of evolution, as Jehovah's Witnesses children were compelled to participate in the flag salute ceremony in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940) and *West Virginia State Board of Education* v. *Barnette, supra.*

The doctrines of the Christian Science faith forbid children to learn the germ theory of disease and many states by statute or practice allow children of Christian Scientists to absent themselves while this part of the biology course is taught. See, e.g., N. Y. Educ. Law sec. 3204(5). Nothing prevents the State of Arkansas from exempting from attendance at sessions of the biology course dealing with evolution the children of parents whose religious conscience would be violated by such attendance. Were the State of

Arkansas unwilling to do so, a substantial free exercise question might well arise. *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *In re Jenison*, 375 U. S. 14 (1963). But *cf. Braunfeld* v. *Brown*, 366 U. S. 599 (1961); *Donner* v. *New York*, 342 U. S. 884 (1951); *Garber* v. *Kansas*, 88 S. Ct. 236 (1967). This is not at issue in the present case. Here the question is whether a law making it a criminal offense for a public school biology teacher to tell the children, or to use a textbook which tells the children, that there is such a thing as a theory of evolution is a forbidden law respecting an establishment of religion.

Nor do we have here any case of hostility to religion or even unneutrality. Concededly, the First Amendment forbids governmental hostility to religion and imposes a mandate of neutrality. *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). We may concede the unconstitutionality of a state law or practice which requires or authorizes public school teachers to teach children that the Biblical account of the creation is false. *United States* v. *Ballard*, 322 U. S. 78 (1944). What we do contend is that a penal statute forbidding teachers of a secular subject from informing their students that a widely-held scientific theory exists, solely because some may consider the theory inconsistent with the Biblical account of the creation, is not an act of neutrality but a specific aid to a particular religion and therefore a violation of the Establishment Clause of the First Amendment. In Galileo's day, it was heresy to teach that the earth revolved around the sun. Yet it can hardly be contended that the inclusion of this teaching in the public school curriculum constitutes unneutrality or manifests a hostility

to religion, nor can it be doubted that a law which makes it a crime to include it would render aid to a specific religious dogma.

The critical point is that the teaching of the theory of evolution, earth's revolution around the sun, and the germ theory of disease are all secular matters. The state's manipulation of its curriculum to bar these secular teachings solely to protect particular religious doctrines represents a law respecting an establishment of religion, no less than would a law requiring history instructors to teach that Jesus was divinely conceived and was resurrected after death.

In *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), this Court suggested (at p. 505) that a law protecting "any or all religions from views distasteful to them" might "raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all." The Court did not find it necessary to explore the question further since it invalidated New York's censorship law under the free speech and free press guarantees of the Amendment. In the present case, however, we submit that such a law does in fact constitute a law respecting an establishment of religion and is inconsistent with the principle of the separation of church and state.

The Court's capacity to take judicial notice of the events of history[1] enables it to recognize the religious origin of the Arkansas statute as it noted the similar origin of the Maryland and Pennsylvania Sunday laws in *Mc-*

1. *Underhill* v. *Hernandez*, 168 U. S. 250 (1897); *The Scotia*, 14 Wall. 170, 186 (1872); *Wright* v. *Hollingsworth*, 1 Pet. 165 (1828).

Gowan v. *Maryland*, 366 U. S. 420 (1961) and *Two Guys* v. *McGinley*, 366 U. S. 582 (1961), and as it noted the nationalist origin of the anti-foreign language statutes invalidated in *Meyer* v. *Nebraska*, *supra*; *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Farrington* v. *Tokushige*, *supra*.

In *McGowan* v. *Maryland*, *supra*, this Court judicially noted that Sunday laws originated as religious laws and that their historic purpose was to forbid desecration of the Christian Sabbath and to coerce compliance with Christian doctrine. The Court nevertheless upheld the constitutionality of the state law assailed in that case because it found as a historical fact that in the course of time the religiosity of the law had disappeared and that its present purpose and effect was the secular one of assuring to all a day of rest and relaxation. However, in the closing paragraph of the Chief Justice's opinion for the Court, he was careful to note (366 U. S. at 453):

> Finally, we should make it clear that this case deals only with the constitutionality of §521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" clause *if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.* (Emphasis added.)

We submit that the sole purpose of the Arkansas anti-evolution law is to use the State's coercive power to protect and aid those sects that adhere to a literal interpretation of Genesis and hold heretical any theory that man may have evolved from a lower order of animals.

The legislative history of the statute leads to no other conclusion. The decade following World War I was one in which there were widespread legislative intrusions on academic freedom. In the West and Midwest, there were numerous efforts to outlaw private schools entirely (see *Pierce* v. *Society of Sisters, supra*; *Farrington* v. *Tokushige, supra*), or to forbid the teaching of foreign languages in private or public schools. (See *Meyer* v. *Nebraska, supra*; *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Bohning* v. *Ohio*, 262 U. S. 404 (1923).) During the same period, the legislatures turned to religious orthodoxy, particularly in the South and Southwest. In the period between 1921 and 1929, anti-evolution bills were introduced in 20 state legislatures.[2] In three of these states, Tennessee, Mississippi and Arkansas, the bills were enacted.[3]

The early Sunday laws made no effort to disguise their religious purpose,[4] this because they saw no constitutional

2. American Civil Liberties Union, "The Gag on Teaching" (2nd ed., 1937), p. 8.

3. Tennessee: Public Acts of 1925, ch. 27, Michie's Code, §§2344-5; Mississippi: Code Ann. §§7315-16; Arkansas: Stats. Ann. §§80-1627-28. On the background of these statutes, see, Beale, *A History of Freedom of Teaching in American Schools*, 202-207 (1941); Blanshard, *The Right to Read*, 213-216 (1955); Hofstadter and Metzger, *The Development of Academic Freedom in the United States*, Chap. VII (1955). On the notorious *Scopes* case in Tennessee, see *Scopes* v. *State*, 154 Tenn. 105 (1927); Darrow, *The Story of My Life*, pp. 244-278 (1932).

4. Thus, for example, the predecessor of the present New York Sunday Law was an act, passed in 1695, "against profanation of the Lord's Day called Sunday," with a preamble declaring:

> Whereas the true and sincere worship of God according to His will and commandments, is often profaned and neglected by many of the inhabitants and sojourners * * * who do not keep holy the Lord's Day but in a disorderly manner accustom themselves to travel, labor, walking * * * and the using of many other

or other objection to the use of the state's compulsory legal machinery to support the doctrines and dogmas of established religion. So, too, the earliest of the anti-evolution statutes, the Tennessee law, was refreshingly ingenuous. Entitled, "An Act prohibiting the teaching of the Evolution Theory in all the Universities, Normals, and all other Public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violations thereof," the statute read, in part:

> SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That it shall be unlawful for any teacher in any of the Universities, Normals, and all other Public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

The Arkansas statute here in issue, enacted two years later, does not refer to "the story of the Divine Creation of man as taught in the Bible" but is otherwise an almost exact

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unlawful exercises and pastimes to the great scandal of the Holy Christian Faith. * * * (Quoted in *People* v. *Hoym*, 20 How. Pr. (N. Y.) 76 (1860).

The Massachusetts law, whose ultimate successor was upheld in *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617 (1961), enacted in 1629, read:

> To the end the Sabbath may be celebrated in a religious manner, we appoint that all that inhabit the plantation, both the general and particular employment, may surcease their labor every Saturday throughout the year at 3 of the clock in the afternoon, and that they spend the rest of the day in catechising and preparation for the Sabbath, as the ministers shall direct. (American State Papers on Freedom of Religion, p. 30 (1949).)

replica of the Tennessee law. The purposes of the two statutes are identical and their constitutional validity under the Establishment Clause are likewise identical.

It can hardly be doubted that a law forbidding the teaching of a secular fact because it may be inconsistent with "the story of the Divine Creation of man as taught in the Bible" violates the Establishment Clause. As the Court said in *Watson* v. *Jones,* 13 Wall, 679, 728 (1872):

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate morality and property, and which does not infringe personal rights is conceded by all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

It is true that the right "to teach any religious doctrine" does not extend to the exercise of that right in the public schools under state auspices. But the statement that the law must be heresy-blind and may support no dogma certainly applies to the domain of public education, and we can think of no more effective way of supporting a dogma than forbidding the teaching of a nonreligious scientific theory which a jury might find to be contrary to something "taught in the Bible." Suppose the majority of a public school board in a particular community were members of the Christian Science Church and issued a directive forbidding the teaching in the biology course of the germ theory of disease or anything else inconsistent with the doctrines contained in *Science and Health with Key to the Scriptures.* Or suppose the legislature in a particular state or city enacted a statute making it a criminal offense for a

teacher in any public school, college or university to teach any secular subject in a way which may be construed to deny some doctrine contained in the Book of Mormon. It can hardly be doubted that in either case the coercive force of law and the machinery of the public educational system would have been used to support particular religious dogma.

It is, of course, constitutionally irrelevant that a comparatively small minority of Americans adhere to the doctrines and believe in the dogmas expressed in Mary Baker Eddy's book or in the Book of Mormon, while a large number of Americans, perhaps a majority, adhere to the doctrines and dogmas expressed in the Bible. See *United States* v. *Ballard,* 322 U.S. 78, 86-87 (1944). The constitutionality of a compulsory Sunday law was upheld in *McGowan* v. *Maryland, supra,* not because Sunday is the religious Sabbath of most Americans, but because the law supported no Sabbath, majority or minority.

The Arkansas statute does not make specific reference to "the story of the Divine Creation of man as taught in the Bible," but the identity of the statutes in origin and purpose is hardly open to question; after all, no legal principle requires that judges close their eyes to what everyone else sees, or their minds to what everyone else knows. This is not a case where the correctness of a historical statement is challenged. The trial court's citation of the *Scopes* decision clearly rests on the assumption that the Tennessee and Arkansas statutes are constitutionally indistinguishable; it refused to follow the *Scopes* decision only because it "has been modified and made obsolete to

such an extent that it * * * should not be followed." (Jurisdictional Statement, p. 33.) The Supreme Court of Arkansas reversed only because it deemed the state's power to control curriculum in its schools to be plenary and judicially unreviewable.

In *McGowan* v. *Maryland, supra,* this Court upheld and applied historical exploration as a means to determine whether a law is religious and therefore forbidden by the Establishment Clause. It found that the particular statute before it had in fact originated as a religious law (366 U.S. at 446) but concluded that it had been purged of its original religiosity and had become a secular law, citing in support of its conclusion the numerous secularizing changes that had been effected since the law was originally adopted, e.g., those permitting operation of bathing beaches and amusement parks, the sale of alcoholic beverages, etc. (*id.* at 448). It was for this reason alone that the Court sustained the constitutionality of the Maryland Sunday law.

No such metamorphosis protects the Arkansas statute. No legislative amendments or judicial interpretations have modified in the slightest the pristine purity and piety of the 1927 law. It was a religious law when enacted and remains a religious law today. As such it is just the type of law forbidden by the Establishment Clause of the First Amendment.

In *Abington School District* v. *Schempp, supra,* this Court suggested the following test of constitutionality under the Establishment Clause (374 U.S. at 222):

> * * * The test may be stated as follows: what are the purpose and the primary effect of the enactment? If

> *either* is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * * (Emphasis added.)

Since, as we have indicated, the purpose of the Arkansas law was the advancement of religion (by protecting it from secular knowledge which might subject its teachings to doubting scrutiny) and that purpose has not changed since its enactment, that alone requires invalidation under the *Schempp* test, which speaks in the alternative. We submit, in addition, that the law is equally unconstitutional under the "primary effect" alternative. Not merely the primary but the exclusive effect of the law is the advancement of religion; we cannot conceive any other effect it might have.

Besides the historical test applied in *McGowan* and the purpose-effect test used in *Schempp*, a third test of validity under the Establishment Clause has been suggested by this Court, the test of neutrality. The decisions of this Court are unanimous in holding that the First Amendment mandates governmental neutrality between religion and nonreligion, and certainly between religion and religion. *Everson* v. *Board of Education*, 330 U.S. 1, 18; *McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306, 313-314; *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961).

It is common knowledge that many religions are not based upon a literal interpretation of the *Book of Genesis*. Nontheistic religions, which this Court held in *Torcaso* are

constitutionally entitled to equal treatment with theistic ones, certainly do not. Among theistic religions, liberal sects interpret the Bible symbolically and metamorphically rather than literally. Even among the orthodox sects the theory of evolution is by no means universally deemed heretical. Thus, for example, the translation and commentary of the *Pentateuch* by the late Chief Rabbi of the British Empire, Dr. J. H. Hertz, used universally in Orthodox Jewish Synagogues, states (at p. 194):

> In the face of this great diversity of views as to the manner of creation, there is, therefore nothing inherently un-Jewish in the evolutionary conception of the origin and growth of forms of existence from the simple to the complex, and from the lowest to the highest. * * * Man, modern scientists declare, is cousin to the anthropid ape. But it is not so much the descent, as the ascent of man, which is decisive. * * *

The Arkansas statute penalizes teaching secular facts which may be inconsistent with a particular, sectarian interpretation of the Bible, but does not forbid teachings consistent with it. This can hardly be described as neutrality between religions, much less neutrality between religion and nonreligion.

"Few groups," Mr. Justice Douglas has said, "have hesitated to create the political pressures that translate into secular law their notions of morality." *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43, 80 (1961) (dissent). Whether these efforts if successful transgress the limits of the Establishment Clause may be disputable. What, we

5. The Arkansas statute, it should be noted, forbids equally teaching the theory that man either ascended or descended from a lower order of animals.

suggest, is not disputable is that an establishment of religion is effected when a sectarian group translates into secular law its particular dogmas of religion; establishment of religion could hardly mean more.

POINT III

The Arkansas statute unconstitutionally abridges freedom of speech since it restricts both freedom to teach and freedom to learn in the absence of any clear and imminent danger to some substantial state interest justifying the restriction.

It is now commonplace that the Constitution protects freedom to hear as well as freedom to speak, and freedom to learn as well as freedom to teach. Academic freedom, the combination of freedom to teach and to learn, is protected by the First Amendment. This protection and the policy underlying it were most recently expressed by this Court in *Keyishian* v. *Board of Regents* (385 U. S. 589, 603 (1967)) in the following language:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, *which does not tolerate laws that cast a pall of orthodoxy over the classroom.* "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker,* 364 U. S. at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than

through any kind of authoritative selection." United States v. Associated Press, D.C., 52 F. Supp. 362, 372. In Sweezy v. State of New Hampshire, 354 U. S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket upon the intellectual leaders in our colleges and universities* would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. *Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*" (Emphasis added.)

The Court in *Keyishian* held unconstitutional a statute which disqualified from academic employment in the state's public school system any teacher who advocated or was a member of an organization which advocated subversive doctrines because the statute had a "chilling effect" on the teacher's freedom to teach and the student's freedom to learn. This resulted from the fact that persons "trained through wide exposure to * * * robust exchange of ideas" would be barred from teaching in public educational institutions. This, however, is only an indirect restraint upon the freedom of the classroom; the Arkansas statute which forbids with penal sanctions the teaching of the theory of evolution or use of textbooks which teach it constitutes a

direct restraint upon the exercise of this First Amendment right.

It is no answer to say that if a teacher does not wish to accept the conditions of his employment he is free to refuse the employment. As the Court said in *Keyishian, supra* (385 U.S. at 605-606), "* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." This is particularly true in a First Amendment case, for the restraint on the teacher's freedom to teach is simultaneously one upon the student's freedom to learn. The student has a personal stake in the teacher's freedom, a stake that cannot be bargained away in a private agreement between state and teacher.

We do not, of course, intimate that the state has no right of control over what the teacher may say in class. Obviously, school authorities can demand that mathematics teachers teach mathematics and biology teachers teach biology. There are, in addition, specific constitutional limitations on what public school teachers may teach. They may not, for example, indoctrinate their students in matters of religious belief or disbelief. *McCollum* v. *Board of Education, supra; Abington School District* v. *Schempp, supra.*

We may even go further. A school teacher does not enjoy in his classroom the absolute immunity accorded by the Constitution to members of the national legislature speaking on the floor of Congress (Article I, Section 6). Under the decisions of the majority of this Court, freedom of speech for non-Congressmen is not absolute. Nevertheless, freedom of speech does occupy a high estate in our hierarchy of constitutional values. Restraints upon that

freedom must be justified only by clear proof of an imminent danger to a substantial state interest. As Mr. Justice Brandeis said in his classic concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 376 (1927):

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. * * *

What "serious evil will result" if public school and college teachers are permitted to teach that there is a theory that man ascended or descended from a lower order of animals? Quite possibly, a consequence of such teaching may be that some students will explore the subject further and arrive at an independent judgment as to its validity or invalidity. But this is exactly the consequence that the free-marketplace-of-ideas concept of the First Amendment seeks to achieve, and therefore certainly is not an evil, serious or otherwise. Possibly, too, some students might subject to a more exacting scrutiny the teachings they receive in Sunday schools regarding the *Book of Genesis*. Such scrutiny might weaken the religious faith of some, but it might also strengthen the faith of others who might be led to exclaim with the Psalmist: "O Lord, how manifold are thy works! in wisdom hast thou made them all * * *" (104:24). In either case, as we have indicated in Point II, the Constitution forbids the state from judging the consequence to be an evil.

It follows that the absence of any constitutionally cognizable substantive evil precludes state restraint on teachers' freedom to teach and students' freedom to learn. The Arkansas statute therefore cannot stand under the free speech guaranty of the First Amendment.

Conclusion

The Arkansas statute is vulnerable on several grounds other than those suggested in this brief. Its language is constitutionally vague, particularly for a penal statute. It is overbroad in its coverage, encompassing as it does educational institutions from kindergarten through university. We have preferred, however, to point our brief to more substantial issues. This is not a little case about an archaic and perhaps in large measure dead-letter law. It is a case raising serious questions of arbitrary governmental action, church-state separation and academic freedom. These questions call for resolution by this Court. They call also for a determination that the statute is unconstitutional.

Respectfully submitted,

LEO PFEFFER
MELVIN L. WULF
Attorneys for
American Civil Liberties Union
191 Willoughby Street
Brooklyn, New York 11201

HOWARD M. SQUADRON
JOSEPH B. ROBISON
Attorneys for American Jewish Congress
15 East 84th Street
New York, New York 10028

Amici Curiae

LEO PFEFFER
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1968.

Susan Epperson et al., Appellants, *v.* State of Arkansas.	On Appeal From the Supreme Court of Arkansas.

[November 12, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

I.

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee "monkey law" which that State adopted in 1925.[1] The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated *Scopes* case in 1927.[2]

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory.

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[1] Chapter 27, Tenn. Acts for 1925; Tenn. Code Ann., § 49–1922.

[2] *Scopes v. Tennessee*, 154 Tenn. 105, 289 S. W. 363 (1927). The Tennessee court, however, reversed Scopes' conviction on the ground that the jury and not the judge should have assessed the fine of $100. Since Scopes was no longer in the State's employ, it saw "nothing to be gained by prolonging this bizarre case." It directed that a *nolle prosequi* be entered, in the interests of "the peace and dignity of the State." 154 Tenn., at 121, 289 S. W., at 367.

Violation is a misdemeanor and subjects the violator to dismissal from his position.[1]

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course "did not have a section on the Darwinian Theory." Then, for the academic year 1965–1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth "the theory about the origin . . . of man from a lower form of animal."

Susan Epperson, a young woman who graduated from Arkansas' school system and then obtained her master's degree in zoology at the University of Illinois, was em-

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[1] Initiated Act No. 1, Ark. Acts for 1929; Ark. Stat. Ann., 1947, §§ 80-1627, 80-1628. The text of the law is as follows:

§ 80-1627.—"Doctrine of ascent or descent of man from lower order of animals prohibited.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institutions a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals."

§ 80-1628.—"Teaching doctrine or adopting textbook mentioning doctrine—Penalties—Positions to be vacated.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act by teaching the theory or doctrine mentioned in section 1 hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars [$500.00]; and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

ployed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions. H. H. Blanchard, a parent of children attending the public schools, intervened in support of the action.

The Chancery Court, in an opinion by Chancellor Murray O. Reed, held that the statute violated the Fourteenth Amendment to the United States Constitution.[4] The court noted that this Amendment encompasses the prohibitions upon state interference with freedom of speech and thought which are contained in the First Amendment. Accordingly, it held that the challenged statute is unconstitutional because, in violation of the First Amendment, it "tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach."[5] In this perspective, the Act,

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[4] The opinion of the Chancery Court is not officially reported.

[5] The Chancery Court analyzed the holding of its sister State of Tennessee in the *Scopes* case sustaining Tennessee's similar statute. It refused to follow Tennessee's 1927 example. It declined to confine the judicial horizon to a view of the law as merely a direction by the State as employer to its employees. This sort of astigmatism, it held, would ignore overriding constitutional values, "and should not be followed," and it proceeded to confront the substance of the law and its effect.

it held, was an unconstitutional and void restraint upon the freedom of speech guaranteed by the Constitution.

On appeal, the Supreme Court of Arkansas reversed.[6] Its two-sentence opinion is set forth in the margin.[7] It sustained the statute as an exercise of the State's power to specify the curriculum in public schools. It did not address itself to the competing constitutional considerations.

Appeal was duly prosecuted to this Court under 28 U. S. C. § 1257 (2). Only Arkansas, Mississippi, and Tennessee have such "anti-evolution" or "monkey" laws on their books.[8] There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact

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[6] 242 Ark. 922, — So. 2d — (1967).

[7] "Per Curiam. Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann., § 80-1627 and § 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

"The decree is reversed and the cause dismissed.

"Ward, J., concurs. Brown, J., dissents.

"Concurrence. I agree with the first sentence in the majority opinion.

"To my mind, the rest of the opinion beclouds the clear announcement made in the first sentence.

"Paul Ward, Associate Justice."

[8] Miss. Code Ann., 1947, §§ 6798-6799; Tenn. Code Ann., § 49-1922; Ark. Stats. Ann., 1947, §§ 80-1627, 80-1628. Oklahoma enacted an antievolution law, but it was repealed in 1926. The Florida and Texas Legislatures, in the period between 1921 and 1929, adopted resolutions against teaching the doctrine of evolution. In all, during that period, bills to this effect were introduced in 20 States. ACLU, "The Gag on Teaching" 8 (2d ed., 1937).

of life in these States.[9] Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II.

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. That court, perhaps reflecting the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind,[10] stated that it "expresses no opinion" as to whether the Act prohibits "explanation" of the theory of evolution or merely forbids "teaching that the theory is true." Regardless of this uncertainty, the court held that the statute is constitutional.

On the other hand, counsel for the State, in oral argument in this Court, candidly stated that, despite the State Supreme Court's equivocation, Arkansas would interpret the statute "to mean that to make a student aware of the theory . . . just to teach that there was such a theory" would be grounds for dismissal and for

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[9] Clarence Darrow, who was counsel for the defense in the *Scopes* trial, in his biography published in 1932, somewhat sardonically pointed out that the States did not insist upon fundamentalist theory in all respects. He said: "I understand that the States of Tennessee and Mississippi both continue to teach that the earth is round and that the revolution on its axis brings the day and night, in spite of all opposition." The Story of My Life 247 (1932).

[10] Hofstader and Metzger, in the Development of Academic Freedom in the United States, 324 (1955), refer to some of Darwin's opponents as "exhibiting a kind of phylogenetic snobbery which led them to think that Darwin had libeled the [human] race by discovering simian rather than seraphic ancestors."

prosecution under the statute; and he said "that the Supreme Court of Arkansas' opinion should be interpreted in that manner." He said "If Mrs. Epperson would tell her students that 'Here is Darwin's theory, that man ascended or descended from a lower form of being,' then I think she would be under this statute liable for prosecution."

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas' statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term "teaching." Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[11]

III.

The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or

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[11] In *Scopes v. State*, 154 Tenn. 105, 126, 289 S. W. 363, 369 (1927), Judge Chambliss concurring, referred to the defense contention that Tennessee's antievolution law gives a "preference" to "religious establishments which have as one of their tenets or dogma the instantaneous creation of man."

to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[12]

As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, 728. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[13] On the other hand, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960), and "This Court will be alert against invasions of academic free-

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[12] *Everson* v. *Bd. of Education*, 330 U. S. 1, 18 (1947); *McCollum* v. *Bd. of Education*, 333 U. S. 203 (1948); *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952); *Fowler* v. *Rhode Island*, 395 U. S. 67 (1953); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961).

[13] See the discussion in Developments in The Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1051–1055 (1968).

dom . . . ." *Barenblatt* v. *United States*, 360 U. S. 109, 112 (1959). As this Court said in *Keyishian* v. *Board of Regents*, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U. S. 589, 603 (1967).

The earliest cases in this Court on the subject of the impact of constitutional guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States. But as early as 1923, the Court did not hesitate to condemn under the Due Process Clause "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn. In that year, the Court, in an opinion by Justice McReynolds, held unconstitutional an Act of the State of Nebraska making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade.[14] The State's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the "baneful effect" of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil. The challenged statute, it held, unconstitutionally interfered with the right of the individuals, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge. *Meyer* v. *State of Nebraska*, 262 U. S. 390 (1923). See also *Bartels* v. *State of Iowa*, 262 U. S. 404 (1923).

[14] The case involved a conviction for teaching "the subject of reading in the German language" to a child of 10 years.

For purposes of the present case, we need not re-enter the difficult terrain which the Court, in 1923, traversed without apparent misgivings. We need not take advantage of the broad premise which the Court's decision in *Meyer* furnishes, nor need we explore the implications of that decision in terms of the justiciability of the multitude of controversies that beset our campuses today. Today's problem is capable of resolution in the narrower terms of the First Amendment's prohibition of laws respecting an establishment of religion or prohibiting the free exercise thereof.

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In *Everson* v. *Board of Education*, this Court, in upholding a state law to provide free bus service to school children, including those attending parocial schools, said: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U. S. 1, 8 (1947).

At the following Term of Court, in *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), the Court held that Illinois could not release pupils from class to attend classes of instruction in the school buildings in the religion of their choice. This, it said, would involve the State in using tax-supported property for religious purposes, thereby breaching the "wall of separation" which, according to Jefferson, the First Amendment was intended to erect between church and state. 333 U. S., at 211. See also *Engel* v. *Vitale*, 370 U. S. 428 (1962); *Abingdon School District* v. *Schempp*, 374 U. S. 203 (1963). While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not col-

lide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. *Abingdon School District*, 374 U. S., at 225. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in *Joseph Burstyne, Inc. v. Wilson*, "the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . ." 343 U. S. 495, 505 (1951). The test was stated as follows in *Abingdon School District* v. *Schempp, supra*, at 222: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

These precedents inevitably determine the result in the present case. The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees. *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606 (1967).

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than

the religious views of some of its citizens.[15] It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[16] Its antecedent, Tennes-

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[15] Former Dean Leflar of the University of Arkansas School of Law has stated that "the same ideological considerations underlie the anti-evolution enactment" as underlie the typical blasphemy statute. He says that the purpose of these statutes is an "ideological" one which "involves an effort to prevent (by censorship) or punish the presentation of intellectually significant matter which contradicts accepted social, moral, or religious ideas." Leflar, Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155, 158 (1956). See also Hofstader and Metzger, The Development of Academic Freedom in the United States 320–366 (1955) (*passim*); H. K. Beale, A History of Freedom of Teaching in American Schools 202–207 (1941); Emerson & Haber, The Scopes Case in Modern Dress, 27 U. Chi. L. Rev. 522 (1960); Waller, The Constitutionality of the Tennessee Anti-Evolution Act, 35 Yale L. J. 191 (1925) (*passim*); ACLU, The Gag on Teaching 7 (2d ed. 1937); Scopes & Presley, Center of the Storm 45–53 (1967).

[16] The following advertisement is typical of the public appeal which was used in the campaign to secure adoption of the statute:

"THE BIBLE OR ATHEISM, WHICH?

"All atheists favor evolution. If you agree with atheism vote against Act. No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote for ACT NO. 1." The Arkansas Gazette, Little Rock, p. 12, col. 4–5, Nov. 4, 1928.

Letters from the public expressed the fear that teaching of evolution would be "subversive of Christianity," *id.*, p. 7, col. 2; see also Oct. 24, 1928, *id.*, p. 19, col. 4, Oct. 31, 1928, and that it would cause schoolchildren "to disrespect the Bible," *id.*, p. 15, col. 5, Oct. 27, 1968. One letter read: "The cosmogony taught by [evolution] runs contrary to that of Moses and Jesus, and as such is nothing, if anything at all, but atheism. . . . Now let the mothers and fathers of our state that are trying to raise their children in the Christian faith arise in their might and vote for this anti-

see's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man, as taught in the Bible, and to teach instead, that man has descended from a lower order of animals." [17] Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language.[18] It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is

Reversed.

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evolution bill that will take it out of our tax supported schools. When they have saved the children, they have saved the state." *Id.*, at col. 4.

[17] Arkansas' law was adopted by popular initiative in 1928, three years after Tennessee's law was enacted and one year after the Tennessee Supreme Court's decision in the *Scopes* case, *supra*.

[18] In its brief, the State says that the Arkansas statute was passed with the holding of the *Scopes* case in mind. Brief for Appellees, p. 1.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1968.

Susan Epperson et al., Appellants, v. State of Arkansas.	On Appeal From the Supreme Court of Arkansas.

[November 12, 1968.]

Mr. Justice Black, concurring.

I am by no means sure that this case presents a genuinely justiciable case or controversy. Although Arkansas Initiated Act No. 1, the statute alleged to be unconstitutional, was passed by the voters of Arkansas in 1928, we are informed that there has never been even a single attempt by the State to enforce it. And the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law should it remain on the books for the next century. Now, nearly 30 years after the law has slumbered on the books as though dead, a teacher alleging fear that the State might arouse from its lethargy and try to punish her has asked for a declaratory judgment holding the law unconstitutional. She was subsequently joined by a parent who alleged his interest in seeing that his two then school age sons ". . . be informed of scientific theories and hypotheses. . . ." But whether this Arkansas teacher is still a teacher, fearful of punishment under the Act, we do not know. It may be, as has been published in the daily press, that she has long since given up her job as a teacher and moved to a distant city, thereby escaping the dangers she had imagined might befall her under this lifeless Arkansas Act. And there is not one iota of concrete evidence to show that the parent-intervenor's sons have not or will not be taught about

evolution. The textbook adopted for use in biology classes in Little Rock includes an entire chapter dealing with evolution. There is no evidence that this chapter is not being freely taught in the schools that use the textbook and no evidence that the intervenor's sons, who were 15 and 17 years old when this suit was brought three years ago, are still in high school or yet to take biology. Unfortunately, however, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit as moot or as lacking the qualities of a genuine case or controversy.

Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts and leaps headlong into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils. While I hesitate to enter into the consideration and decision of such sensitive state-federal relationships, I reluctantly acquiesce. But agreeing to consider this as a genuine case or controversy I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decision of this particular case requires. And the Court, in order to invalidate the Arkansas law as a violation of the First Amendment, has been compelled to give the State's law a broader meaning than the State Supreme Court was willing to give it. The Arkansas Supreme Court's opinion, in its entirety, stated that:

> "Upon the principle issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann., § 80–1627 and §80–1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether

the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised."

It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum. And for all the Supreme Court of Arkansas has said, this particular Act may prohibit that and nothing else. This Court, however, treats the Arkansas Act as though it made it a misdemeanor to teach or to use a book that teaches that evolution is true. But it is not for this Court to arrogate to itself the power to determine the scope of Arkansas statutes. Since the highest court of Arkansas has deliberately refused to give its statute that meaning, we should not presume to do so.

It seems to me that in this situation the statute is too vague for us to strike it down on any ground but that: vagueness. Under this statute as construed by the Arkansas Supreme Court, a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true. It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process. See, *e. g.*, *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). Holding the statute too vague to enforce would not only follow long-standing constitutional precedents but it would avoid having this Court take unto itself the duty of a State's highest court to interpret

and mark the boundaries of the State's laws. And more important, it would not place this Court in the unenviable position of violating the principle of leaving the States absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command.

The Court, not content to strike down this Arkansas Act on the unchallengeable ground of its plain vagueness, chooses rather to invalidate it as a violation of the Establishment of Religion Clause of the First Amendment. I would not decide this case on such a sweeping ground for the following reasons, among others.

1. In the first place I find it difficult to agree with the Court's statement that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of the doctrine as to the origin of man." It may be instead that the people's motive was merely that it would be best to remove this controversial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this Court has consistently held that it is not for us to invalidate a statute because of our views that the "motives" behind its passage were improper; it is simply too difficult to determine what those motives were. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 382–383 (1968).

2. A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advo-

cate such an "anti-religious" doctrine to schoolchildren? The very cases cited by the Court as supporting its conclusion hold that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.

3. I am also not ready to hold that a person hired to teach schoolchildren takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech "while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U. S. 536, 544; *Cox* v. *Louisiana*, 379 U. S. 559, 574. I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

Certainly the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely

been criticized by religionists but by scientists, and perhaps no scientist would be willing to take an oath and swear that everything announced in the Darwinian theory is unquestionably true. The Court, it seems to me, makes a serious mistake in bypassing the plain, unconstitutional vagueness of this statute in order to reach out and decide this troublesome, to me, First Amendment question. However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.

I would either strike down the Arkansas Act as too vague to enforce, or remand to the State Supreme Court for clarification of its holding and opinion.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1968.

Susan Epperson et al., Appellants, v. State of Arkansas.	On Appeal From the Supreme Court of Arkansas.

[November 12, 1968.]

Mr. Justice Harlan, concurring.

I think it deplorable that this case should have come to us with such an opaque opinion by the State's highest court. With all respect, that court's handling of the case savors of a studied effort to avoid coming to grips with this anachronistic statute and to "pass the buck" to this Court. This sort of temporizing does not make for healthy operations between the state and federal judiciaries. Despite these observations, I am in agreement with this Court's opinion that, the constitutional claims having been properly raised and necessarily decided below, resolution of the matter by us cannot properly be avoided.* See, *e. g., Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574, 579 (1885).

I concur in so much of the Court's opinion as holds that the Arkansas statute constitutes an "establishment of

*Short of reading the Arkansas Supreme Court's opinion to have proceeded on the premise that it need not consider appellants' "establishment" contention, clearly raised in the state courts and here, in view of its holding that the State possesses plenary power to fix the curriculum in its public schools, I can perceive no tenable basis for remanding the case to the state court for an explication of the purpose and meaning of the statute in question. I am unwilling to ascribe to the Arkansas Supreme Court any such quixotic approach to constitutional adjudication. I take the first sentence of its opinion (*ante*, p. 4, n. 7) to encompass an overruling of appellants' "establishment" point, and the second sentence to refer only to their "vagueness" claim.

religion" forbidden to the States by the Fourteenth Amendment. I do not understand, however, why the Court finds it necessary to explore at length appellants' contentions that the statute is unconstitutionally vague and that it interferes with free speech, only to conclude that these issues need not be decided in this case. In the process of *not* deciding them, the Court obscures its otherwise straightforward holding, and opens its opinion to possible implications from which I am constrained to disassociate myself.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1968.

Susan Epperson et al., Appellants, v. State of Arkansas.	On Appeal From the Supreme Court of Arkansas.

[November 12, 1968.]

Mr. Justice Stewart, concurring in the result.

The States are most assuredly free "to choose their own curriculums for their own schools." A State is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.

It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth.

The Arkansas Supreme Court has said that the statute before us may or may not be just such a law. The result, as Mr. Justice Black points out, is that "a teacher cannot know whether he is forbidden to mention Darwin's theory at all." Since I believe that no State could constitutionally forbid a teacher "to mention Darwin's theory at all," and since Arkansas may, or may not, have done just that, I conclude that the statute before us is so vague as to be invalid under the Fourteenth Amendment. See *Cramp* v. *Board of Pub. Instruction*, 368 U. S. 278.